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In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

APPENDIX TO RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

HORVITZ & LEVY
PETER ABRAHAMS*
GERALD SERLIN
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800 and (213) 872-0802

Counsel for Respondent Shirley G. Quan

*Counsel of Record

March 1, 1991

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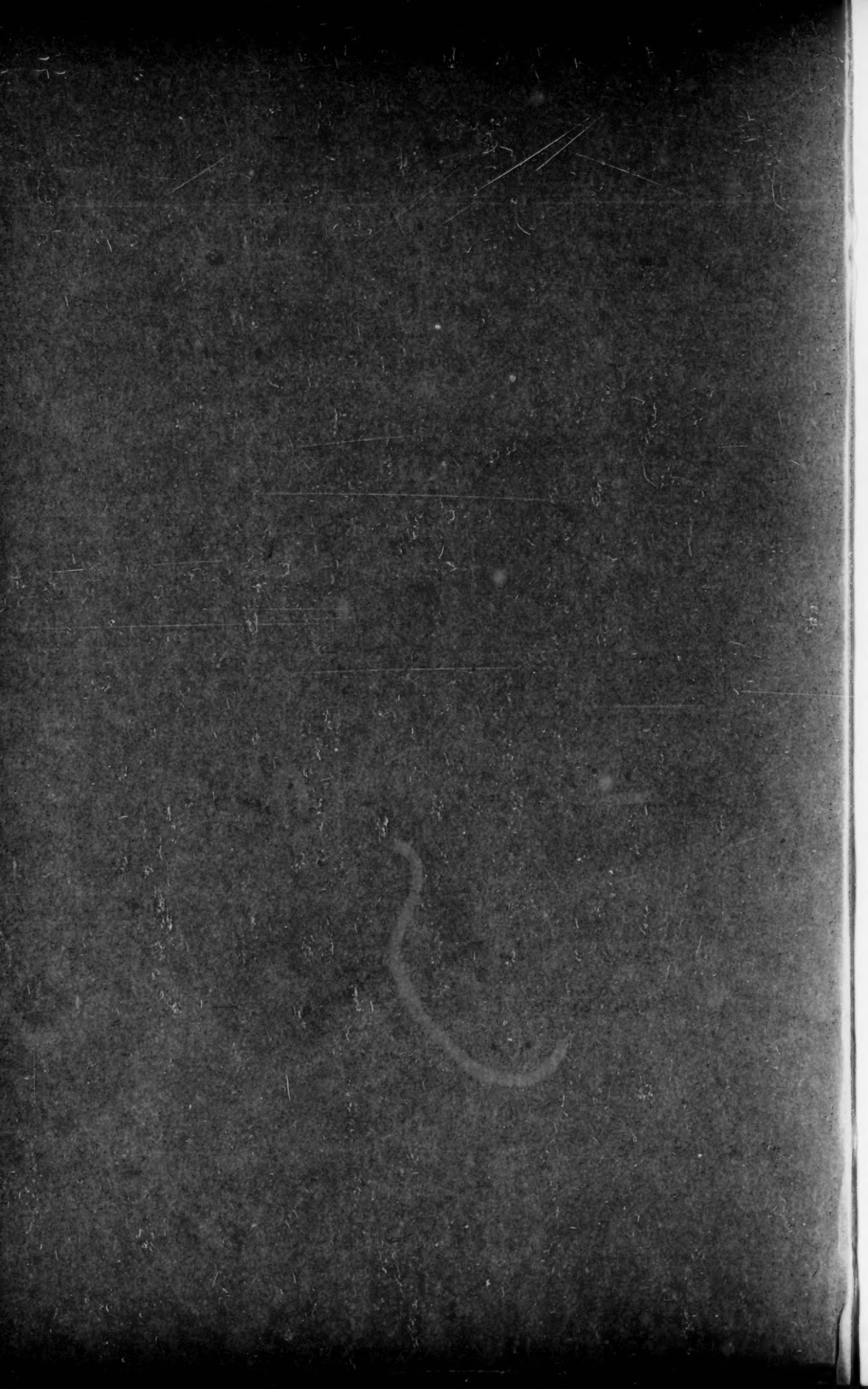

INDEX TO APPENDICES

Page

Appendix A Defendants' Demurrer to Plaintiff's Third Amended Complaint..... 1a

Appendix B Appellant's Opening Brief in the California Court of Appeal..... 69a

Appendix C Appellant's Reply Brief in the California Court of Appeal.....170a

Appendix D Excerpt, Respondent Genetics Institute's Petition for Review in the Supreme Court of California.....227a

Appendix E Excerpt, Respondent Golde's Petition for Review in the Supreme Court of California..... 229a

Appendix F Excerpt, Respondent Quan's Petition for Review in the Supreme Court of California..... 231a

Appendix G Excerpt, Respondent Regent's Petition for Review in the Supreme Court of California.....234a

Appendix H Excerpt, Respondent Sandoz's Petition for Review in the Supreme Court of California.....236a

Appendix I Excerpt, Petitioner's Answer to Petition for Review in the Supreme Court of California.....239a

DONALD L. REIDHAAR
CHRISTINE HELWICK
ALLEN B. WAGNER
DAVID M. BIRNBAUM
590 University Hall
University of California
Berkeley, CA 94720
Telephone: (415) 642-2822

O'FLAHERTY, ABRAHAMS & CARL
PETER ABRAHAMS
1545 Wilshire Blvd., Suite 302
Los Angeles, CA 90017
Telephone: (213) 484-4977

Attorneys for Defendants

BALL, HUNT, HART, BROWN & BAERWITZ
ANTHONY MURRAY
4525 Wilshire Blvd., Third Floor
P. O. Box 76942
Los Angeles, CA 90076
Telephone: (213) 937-8999

Attorneys for Defendant DAVID W. GOLDE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN MOORE, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	Case No. C513755 Date: December 10, 1985 Time: 9:00 a.m. Dept: 83 Trial Date: None Set

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRERS TO PLAINTIFF'S THIRD AMENDED COMPLAINT

SUBJECT INDEX

		Page
I.	SUMMARY OF ARGUMENT	1
II.	THE THIRD AMENDED COMPLAINT STILL DOES NOT SATISFY THE CONCERNS EXPRESSED BY THIS COURT IN SUSTAINING DEFENDANTS' EARLIER DEMURRERS	10
III.	DEMURRER TO THE "CONVERSION" FIRST CAUSE OF ACTION	18
	A. The Essential Averments of Conversion	18
	B. Plaintiff has no Property Interest in the Subject Matter	18
	1. Plaintiff has no Property Interest in Therapeutically Excised Human Tissue	18
	2. Plaintiff has no Possessory or Property Interest in Defendants' Patent	23
	3. There Is No Property Interest In Unpatented Knowledge	28
	C. Defendants Did Not Unlawfully Withhold or Convert Property	28
	D. Plaintiff has not Been Damaged	28
	E. In Any Event, Plaintiff's Claim for Conversion is Barred by the Statute of Limitations	29
IV.	DEMURRER TO THE "LACK OF INFORMED CONSENT" SECOND CAUSE OF ACTION	32
	A. No Claim for Lack of Informed Consent Can Be Stated	32
	B. Plaintiff Fails to Allege Any Appropriate Damages for the Lack of Informed Consent	38

C. In Any Event, Plaintiff's Claim for Lack of Informed Consent is Barred by the Statute of Limitations 39

V. DEMURRER TO THE "BREACH OF FIDUCIARY DUTY" THIRD CAUSE OF ACTION.... 40

A. No Fiduciary Duty Owed Plaintiff has Been Breached 40

B. Plaintiff Fails to Allege Any Appropriate Damage For Any Breach of Fiduciary Duty 46

C. In Any Event, Plaintiff's Claim for Breach of Fiduciary Duty is Probably Barred by the Statute of Limitations..... 46

VI. DEMURRER TO THE "FRAUD AND DECEIT" FOURTH CAUSE OF ACTION 47

A. Application of Governmental Immunity 47

B. The Essential Averments of Fraud and Deceit 47

C. No Claim for Fruad [sic] or Deceit has Been Alleged 48

1. Plaintiff's Allegations..... 48

2. No Cause of Action for Concealment has Been Stated 49

3. Plaintiff's Allegations Lack Specificity 49

4. Plaintiff Failed to Allege Materiality of any Misrepresentation 51

5. Plaintiff's Averments do not Demonstrate Falsity, or Defendants' Knowledge of Falsity 51

6. Plaintiff has Not Been Damaged by Any Alleged Fraud or Deceit..... 54

D. In Any Event, Plaintiff's Claims for Fraud and Deceit Are Barred by the Statute of Limitations..... 55

VII. DEMURRERS TO THE REMAINING FIFTH THROUGH THIRTEENTH CAUSES OF ACTION 55

A. Demurrer to the "Unjust Enrichment" Fifth Cause of Action 55

B. Demurrer to the "Quasi-Contract" Sixth Cause of Action 56

C. Demurrer to the "Bad Faith Breach of the Implied Covenant of Good Faith and Fair Dealing" Seventh Cause of Action 57

D. Demurrer to the "Intentional Infliction of Emotional Distress" Eighth Cause of Action 58

E. Demurrer to the "Negligent Misrepresentation" Ninth Cause of Action 59

F. Demurrer to the "Intentional Interference with Prospective Advantageous Economic Relationship" Tenth Cause of Action 59

G. Demurrer to the "Slander of Title" Eleventh Cause of Action 59

H. Demurrer to the "Accounting" Twelfth Cause of Action 60

I. Demurrer to the "Declaratory Relief" Thirteenth Cause of Action 60

VIII. DEMURRER TO ALL CAUSES OF ACTION BY CLAIM OF IMMUNITY 61

A. Immunity Under the California Government Tort Claims Act 61

B. Application of Immunity to the Plaintiff's claims 63

IX. REQUEST THAT DEMURRERS BE SUSTAINED WITHOUT LEAVE TO AMEND 66

X. CONCLUSION 67

TABLE OF AUTHORITIES

Case Name — Page

Application of Argoudelis (C.C.P.A. 1970) 434 F.2d 1390 44

Baker v. Beech Aircraft Corp. (1974) 39 Cal.App.3d 315, 321 31

Bank of America v. Williams (1948) 89 Cal.App.2d 21, 25 31

Branche v. Hetzel (1966) 241 Cal.App.2d 801, 807 55

Browning v. Norton-Children's Hospital (Ky. 1974) 504 S.W.2d 713 ..... 42, 43

Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827 59

California Credit & Collection Corp. v. Bernardini (1926) 77 Cal.App. 381, 383-4 52

Canterbury v. Spence (D.C. Cir. 1972) 464 F.2d 772, 782, 786 ..... 33, 34

Casualty Insurance Co. v. Rees Investment Co. (1971) 14 Cal.App.3d 716, 719-20 55

Cobbs v. Grant (1972) 8 Cal.3d 229, 240-241, 243-244 ..... 33, 34, 35, 36, 38, 39, 44

Committee on Children's Television v. General Food Corp. (1983) 35 Cal.3d 197, 221 40

Davidson v. City of Westminster (1982) 32 Cal.3d 197, 209 58

Diamond v. Chakrabarty (1980) 447 U.S. 303, 307 [65 L.Ed.2d 144, 148] 23, 25, 26, 53

Enos v. Snyder (1900) 131 Cal. 68, 69 20

Feldman v. Aunstrup (C.C.P.A. 1975) 517 F.2d 1351 44

Franklin v. Municipal Court (1972) 26 Cal.App.3d 884, 901 18

Friedberg v. Weissbuch (1955) 135 Cal.App.2d 750, 754 51

Funk Bros Co. v. Kal Co. (1948) 333 U.S. 127 [92 L.Ed. 588] 25

Gagne v. Bertran (1954) 43 Cal.2d 481, 487 51

Gayler v. Wilder (1850) 51 U.S. 477, 494 [13 L.Ed. 504, 511] 24

Golden v. Dungan (1971) 20 Cal.App.3d 295, 308-9 58

Gonzales v. State of California (1977) 68 Cal.App.3d 621, 627-28, 631 .....55, 56

Gray v. Southern Pacific (1937) 21 Cal.App.2d 240, 246 20

Haldane v. Freedman (1962) 204 Cal.App.2d 475, 479 54

Harold A. Newman Co. v. Nero (1973) 31 Cal.App.3d 490, 497 56

Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal.App.2d 702, 707 50

Holton v. Noble (1890) 83 Cal. 7, 8 51

Howard v. Schaniel (1980) 113 Cal.App.3d 256, 262-3 60

Howes v. Great Lakes Press Corp. (2d Cir. 1982) 679 F.2d, 1023, 1029 25

Johnson v. California (1968) 69 Cal.2d 782, 799-800 .63, 64

Kinner v. World Sav. & Loan Assn. (1976) 57 Cal.App.3d 724, 729 and 734..... 7

Le Clercq v. Michael (1948) 88 Cal.App.2d 700, 703 52

Lesperance v. North American Aviation, Inc. (1963) 217 Cal.App.2d 336, 345 .....48, 49

Mohr v. Williams (Minn. 1905) 104 N.W. 12..... 33

Norkin v. United States Fire Ins. Co. (1965) 237 Cal.App.2d 435, 437 49

O'Donnell v. Slack (1899) 123 Cal. 285, 289..... 20

Orange County Rock Prod. Co. v. Cook Bros. Equip. Co. (1966) 246 Cal.App.2d 698, 703..... 55

Page v. City of Montebello (1980) 112 Cal.App.3d 658, 670-71 63

Pratt v. Davis (Ill. 1906) 79 N.E. 562..... 33

Rolater v. Strain (Okla. 1913) 137 P.96 33

Safeway Stores v. Retail Clerks, etc. Assn. (1953) 41 Cal.2d 567, 574..... 7

Schloendorff v. Society of New York Hospitals (1914) 211 NY 125, 104 N.E. 92..... 33

Schneider v. Union Oil Company (1970) 6 Cal.App.3d 987, 993 46

Schonfeld v. City of Vallejo (1975) 50 Cal.App.3d 401, 410.....62, 63

Shell v. Schmidt (1954) 126 Cal.App.2d 279, 288; *cert. den.* 348 U.S. 916 52

Sinai Temple v. Kaplan (1976) 54 Cal.App. 3d 1103, 1110 20

Skopp v. Weaver (1976) 16 Cal.3d 432, 436 40

South Tahoe Gas Co. v. Hoffman Land Improvement Co. (1972) 25 Cal.App.3d 750, 765.....48, 54

Thomas v. Hawkins (1950) 96 Cal.App.2d 377, 379 51

Thompson v. Boisselier (1884) 114 U.S. 1, 10 [29 L.Ed. 76, 79] 23

United States v. Neustadt (1961) 366 U.S. 696, 711, n.26..... 64

Vasquez v. Superior Court (1971) 4 Cal.3d 800, 811 51

Wallis v. Superior Court (1984) 160 Cal.App.3d 1109, 1116-1119..... 57

Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, 947.....60, 61

Wolleson v. Coburn (1923) 63 Cal.App. 315, 323 51

Wooster v. Nevills (1887) 73 Cal. 58, 60 60

Federal Statutes

35 United States Code §§ 1-376 ..... 24, et seq.

42 United States Code §274(e), P.L. 98-507 (Oct. 19, 1984) 98 Stat. 2339 20

42 United States Code § 289 1-3 37

45 Code of Federal Regulations, §§ 46.101, et seq 37

California Statutes

California Administrative Code, Title 22, section 707..... 35

California Health and Safety Code, § 150, et seq 43

California Health and Safety Code, § 206 43

California Health and Safety Code, §7054.4.. 19, et seq.

California Health and Safety Code, §§ 7150, et seq. 19

California Health and Safety Code, §§ 24170, et seq. 36, 37, 38, 44

Civil Code, §§ 654 and 655 19

Code of Civil Procedure, § 338(3) 30, 39

Code of Civil Procedure, § 338(4) 55

Code of Civil Procedure, § 340(3) 39

Code of Civil Procedure, § 340.5 .....38, 39

Code of Civil Procedure, § 1060 60

Government Code, § 811.2 64

Government Code, §§ 814, et seq 47, 61, 62

Other Authorities

Storey Contracts § 546 7

1 Witkin, Summary of California Law (8th ed. 1973) Contracts § 476, p. 493 57

3 Witkin, Cal. Procedure (2d ed. 1971) Pleading § 564 et seq., pp. 2203-2206 18

4 Witkin, Summary of California Law, (8th ed. 1974) Torts §§ 354, 356 and 357, pp. 2614-2616 27

In support of their demurrers to plaintiff's Third Amended Complaint[1], The Regents of the University of California (herein "Regents"), its Professor of Medicine, physician-scientist David W. Golde (herein "Golde"), and its Laboratory Technician Shirley G. Quan (herein "Quan"), herein collectively referred to as "defendants" or "University," submit the following statement, points and authorities.

I. SUMMARY OF ARGUMENT

After an extraordinary amount of discovery[2], conducted by and at the request of plaintiff's counsel over the course of the past twelve months, and after three prior demurrers by defendants, plaintiff now files his Third Amended Complaint. While there is considerably more factual material alleged in this version of his pleading, plaintiff has *not* modified his material allegations in any substantial manner. Plaintiff's complaint remains unresponsive to the matters of concern raised by this Court during defendants' demurrers to the First and Second Amended Complaint versions. As with its predecessors, this latest version of the complaint is a confusing morass of equivocal half statements that simply do not

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[1] Herein occasionally abbreviated TAC.

[2] Including: Golde's deposition, Quan's deposition, the deposition of The Regents' Custodian of Records, 40 pages of Answers to Interrogatories and the production of approximately 50,000 pages of documents. (See Attached Declaration of Wagner.)

allege a claim against defendants. While the standard for testing a pleading by demurrer assumes the truth of the draftor's allegations, where those allegations are equivocal and uncertain they must be interpreted against the draftor. So construed, and viewed in the context of its precedent versions, the Third Amended Complaint describes the following story.

Sometime in September 1976, plaintiff's physician in Alaska diagnosed him to have a blood cancer – "hairy-cell leukemia" (TAC ¶6). Plaintiff then came to the University of California Los Angeles Medical Center and sought "an additional opinion" concerning his condition (TAC ¶7) from Professor David W. Golde, who allegedly was "a renowned and internationally famous author, scientist, researcher and inventor" (FAC[3] ¶2). Professor Golde confirmed the Alaskan physician's diagnosis and recommended the surgical removal of plaintiff's spleen ("splenectomy" as the indicated treatment (TAC ¶12). Plaintiff consented to the therapeutic treatment (TAC ¶19) and on or about October 20, 1976, his spleen was surgically removed (TAC ¶22). Over a period of approximately seven years following his operation, Dr. Golde recommended plaintiff's return visits for further medical attention (TAC ¶30). Except for the first month (during which three visits occurred) those visits were slightly more frequent than annually comprising nine occasions in nearly seven years (*Ibid*). During these visits plaintiff consented to the withdrawal of specimens of his blood and other substances for the purpose of his medical care

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[3] First Amended Complaint abbreviated "FAC" herein.

(TAC ¶31) and on at least two occasions expressly for the purpose of defendants' research (TAC ¶¶42, 44, 46 and 48).

The several versions of plaintiff's complaint are all equivocal regarding plaintiff's awareness of the University's research interest and intention. On the one hand, plaintiff alleged: his awareness of Professor Golde's fame as an "author, scientist, researcher and inventor" (FAC ¶2); his awareness "at all times relevant herein," that he and his disease "were of scientific curiosity and academic interest" to defendants (OC[4] ¶7); and, that "throughout his treatment" he was aware and inquired about defendants' research (TAC ¶35). Yet, plaintiff complains he was not informed, did not know, and did not consent to any alleged "research *and* commercial" activities involving the result of the University's research.

Plaintiff does *not* allege defendants *knew* of any particular research or possible commercial value prior to the splenectomy. At most, he alleges defendants were in a better position to speculate about possible commercial utility of yet unknown research results (TAC ¶¶8, 9 and 10). Plaintiff admits research occurred with his expressed as well as tacit consent (TAC ¶¶35, 44 and 48). And he alleges *no* "commercial" activity until 1980 (TAC ¶41(h)), over three years after his 1976 splenectomy. After extensive discovery in this case, plaintiff does not, for indeed he could not, allege defendants had any knowledge of "commercial" utility of their research prior to the August 1979 report of possible patentable invention (TAC ¶41(f)) and after the several years of intervening research. Now

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[4] Original Complaint abbreviated "OC" herein.

that plaintiff has learned that the research involving a specimen of his therapeutically excised tissue resulted in a patentable advancement of medical science, that the University's research continues, and that some commercial entities have been given some of those research results in order to explore potential utility for the public benefit, plaintiff brings this action claiming some right, title or interest not only to the patent, but to all the knowledge and understanding brought about by that research.

As with the Second Amended Complaint, plaintiff's carefully drafted Third Amended Complaint: does *not* claim any medical malpractice or other professional negligence; does *not* deny the alleged representation that defendants' purpose *always* included his care, health and treatment (pathologic or diagnostic); does *not* deny that the substances withdrawn under a representation of medical care, were in fact used for his care, health, and treatment for pathologic or diagnostic purposes; does *not* allege defendants knew, or could have known, of any speculative value to research involving his diseased spleen; does *not* deny that defendants obtained plaintiff's consent to research, when the substances withdrawn were beyond that necessary for his care, health and treatment; does *not* allege the exposure to any physical risk he did not consent to; does *not* allege the University's research activities were in any manner inconsistent with the care, health and treatment given plaintiff; and *still* does *not* disclose when and how he first became aware of the University's research activities.

In essence, plaintiff's complaint presents two issues:

1) May an academic medical research center conduct scientific studies upon a specimen of therapeutically excised (pathologic or diagnostic) tissue, *after* its therapeutic use, and relying upon the patient's informed consent to the medical treatment removal?

2) If not, must "consent" to such research include speculation of any value or commercial utility of the yet unknown research results?

By its demurrer, the University asserts that scientific research conducted at an academic medical research center upon a specimen of pathologic or diagnostic human tissue removed in the course of proper medical treatment, simply does *not* constitute a cause of action, or a wrong to plaintiff. The University further contends that its lawful possession of the tissue *ab initio* (whether as a result of consent to research *or* to medical treatment) constitutes appropriate dominion for its use in scientific research and for the disposition of any research results; and that plaintiff's silence coupled with his admitted awareness of the University's scientific curiosity and research interests constitues [sic] an implied abandonment of any interest he may have had. Finally, the University submits that "informed consent" serves the purpose of lawful access, and *not* a purpose of direction or control over the research or its results.

Plaintiff asserts a right of prior consent to any investigation involving therapeutically removed tissue, and a right of prior consent to the commercial utilization of any results of research, whether or not consented to. He asserts these rights as a matter of property interest in the

removed tissue, and as a fiduciary-type duty conditioning the University's scientific inquiry into that tissue. All his causes of action are, at least in part, dependent upon the existence of such a property interest or such a duty, and are either redundant or remedial to them. And, that includes the alleged fraud (vested property interest) and deceit (duty to disclose) cause of action. The University has been unable to find *any* prior case establishing such a property interest or such a duty.

Where a complaint asserts a claim for which *no* legal precedent has imposed a duty on defendants, the court may decide the case on public policy grounds, as well as related case law. And, if no duty exists, all the causes of action based on the alleged duty would fail without the need for detailed technical consideration of each. (*Kinner v. World Sav. & Loan Assoc.* (1976) 75 Cal.App.3d 724, 729, and 734.) Accordingly, the University's demurrer asks whether the undisclosed scientific inquiry using therapeutically removed tissue, or the non-disclosure that research results may have commercial utility, affronts "that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel is against public policy." (*Ibid.* at 729 [quoting *Safeway Stores v. Retail Clerks, etc. Assoc.* (1953) 41 Cal. 2d 567, 574, which quoted *Storey, Contracts*, § 546].)

In opposing plaintiff's Third Amended Complaint, the University submits:

1) That plaintiff has not satisfied the concerns raised by this Court in sustaining defendants' demurrers to the First and Second Amended Complaints.

2) That significant public policy precludes plaintiff's claim of property in his therapeutic tissue, or the results of the University's research upon it. (Examined under the "Conversion" cause of action.)

3) That "consent" to research should not, and could not, include consent to speculative value or commercial utility of yet unknown research results. (Examined under the "Informed Consent," "Fiduciary Duty" and "Fraud and Deceit" causes of action).

4) That significant public policy precludes plaintiff's claim that the University's scientific inquiry into therapeutic tissue was conditioned by a duty to obtain his consent prior to that inquiry. (Examined under the "Informed Consent" and "Fiduciary Duty" causes of action.)

5) That the Third Amended Complaint is subject to a statute of limitations bar disclosed on its face, and plaintiff's attempt to avoid that bar is insufficient and fails to demonstrate diligence.

6) That plaintiff has not alleged any appropriate injury or damage compensable under his property or duty theories.

7) That, in any event, the defendants, and each of them, are immune under the California Government Tort Claims Act from each cause of action, including fraud and deceit, since each relies upon a claim of negligent or intentional misrepresentation.

Plaintiff's claim of a *duty* must be balanced against the general need for medical research, the practical impossibility of disclosing what is unknown prior to the research, and the public policy considerations opposing

an intrusion into the physician-patient relationship of matters that are independent and irrelevant to the medical treatment and the physical risks associated with it. Plaintiff's claim of a *property expectancy* must be balanced against the public policy considerations opposing the "sale" of human tissue, and the public policy rewarding intellectual advancements expressed in the Federal Patent Law (prohibiting plaintiff's claim to the University's patent: *first*, for his lack of inventorship, and *second*, by the statutory provisions regarding patents from federally funded research). Moreover, plaintiff's claim demands the impossible, i.e., the disclosure of what is obviously unknown before the research is conducted. In so doing, plaintiff seeks to maintain a controlling interest in that research and its results. That claim opposes the significant public policy encouraging the University's research effort for the advancement of medical knowledge and technology for the public benefit, and would have a considerable chilling effect upon that research and the University's ability to freely disseminate that knowledge.

II. THE THIRD AMENDED COMPLAINT STILL DOES NOT SATISFY THE CONCERNS EXPRESSED BY THIS COURT IN SUSTAINING DEFENDANTS' EARLIER DEMURRERS.

In sustaining the defendants' demurrers to the First Amended Complaint, this Court held that the following material issues needed to be explicitly alleged:

1) Whether the removal of bodily tissue and substances was on each occasion for the purpose or including the purpose of care, treatment or diagnosis of plaintiff's ailment.

2) Whether plaintiff consented to the removal for purposes of care, treatment or diagnosis.

3) Whether such substances and tissues were in fact used by defendants for the purpose (among others) of care, treatment and diagnosis of plaintiff.

4) Whether plaintiff knew or reasonably should have known that defendants as part of said care, treatment or diagnosis would have conducted tests and other research on said substances and tissue.

5) Whether, if plaintiff had known the defendants' alleged true intentions, he would not have submitted himself to the removal or withdrawal of such substances and tissues for the purpose of said care, treatment or diagnosis by defendants.

The Third Amended Complaint still does not reply to the first or third above issues. It does *not* allege any tissue removal was absent a purpose that included the care, treatment or diagnosis of plaintiff's ailment, even on those occasions (April 11, and September 20, 1983) when he gave written consent for research withdrawals. Nor does he allege that the substances removed under a representation of care, treatment or diagnosis, were in fact *not* used for the stated purpose (among others). As to the spleen, the Third Amended Complaint, in this critical regard, carefully alleges that "after its removal," it was not used "in connection with his *actual* medical and health *care, treatment or diagnosis*" (TAC ¶24). He is silent on whether the removal was itself pathological. As to the subsequent blood and substance withdrawals, plaintiff dropped the reference to "diagnosis" (used with the spleen) and alleges that they were *not* used "to *further or*

improve plaintiff's health and well-being," or to assist in the "*actual* medical and health *care received*" (TAC ¶34). Again, plaintiff carefully avoids the obvious, that is, they were post-operative and continuing diagnostic tests. Other than those guarded allegations, the Third Amended Complaint (like the Second Amended Complaint before it) is mute on whether the defendants' *purposes* included plaintiff's care, treatment or diagnosis in the tissue removals, or separately, in their use. *Indeed,* plaintiff nowhere denies the truth of defendants' alleged representations that their purposes always *included* plaintiff's care and treatment (TAC ¶¶19, 30 and 48).

While the Third Amended Complaint seems to respond to the second and fifth above stated issues, it remains equivocal in several respects. On the second issue, plaintiff clearly admits consent to the splenectomy, for the purpose of his care, treatment and diagnosis (TAC ¶¶19 and 21). As to the subsequent substance withdrawals, plaintiff alleges defendants' representations of care, treatment, and diagnosis (TAC ¶30), but is unclear on what consent he gave for their withdrawal (TAC ¶31), except for his (written) consents to research given on April 11 (TAC ¶44), and September 20 (TAC ¶48), 1983. On the fifth issue (on how plaintiff would have acted had he known the defendants' alleged intentions), plaintiff remains obtuse. As to the splenectomy, he conditions his response to include not only knowledge of the intention to do research and the possibility of commercial utility of research results, but he further includes the hind sight [sic] knowledge of the research results. Had he known *all that,* then he would not have undergone the surgery for purely medical and health care purposes (TAC ¶26);

rather, he would have *"considered" his alternatives* (TAC ¶28), sought "control" over the research (TAC ¶27), and sought financial participation in any use of the research results (TAC ¶29). As to the subsequent substance withdrawals, the Third Amended Complaint is simply mute on how, if at all, plaintiff's conduct would have been different had he known of the defendants' alleged intentions, except for the April 11, and September 20, 1983 occasions. As to those latter occasions, plaintiff alleges *only* that he would have withheld his written consent to the research withdrawals (TAC ¶¶45 and 51). Plaintiff simply does *not allege* there would be *any difference* in his consent to the medical care and treatment given by defendants, except as noted above. Apparently, plaintiff consented to the medical treatment, and would, in all probability, not have done anything different, even if he did know of possible commercial activity.

The remaining point raised by the Court asked whether plaintiff "knew or reasonably should have known" that "tests and other research would be conducted" upon such removed substances. Again, plaintiff does *not* respond directly to the issue; *instead,* he conjunctively adds "commercial" to the "research" inquiry and alleges that he did not know or have cause to know of alleged "research *and* commercial activities" of defendants" (TAC ¶¶15, 33 and 49). Plaintiff's attempt to tuck and hide his awareness of "research" behind an unawareness of the University's technology transfer policy is transparently obvious by his standard denial of knowledge for the April 11, and September 20, 1983 removals (TAC ¶¶45 and 51) where he admits consent to the research (TAC ¶¶44 and 48).

Nowhere does plainiff [sic] deny that he knew, or reasonably expected that scientific testing and research would occur at the University. Indeed, he admits he knew of the research "throughout [his] care and treatment," and that "during *each* of [his] visits and withdrawals" he sought to inquire into "the nature, purpose and progress of the research," and was told it was "scientific medical research" (TAC ¶35). Moreover, Professor Golde is not alleged to be plaintiff's family physician, but rather an acknowledged and renowned research scientist at the University's academic medical research center (FAC ¶2), to which plaintiff came bearing his disease and hoping, no doubt, to capture interest for the benefit he would thereby receive. Plaintiff was aware, and had more than reasonable cause to know, that scientific testing and research would occur at the University. In *consciously* seeking medical treatment that would incorporate the most current state of the art research, did plaintiff not thereby *implicitly* consent to the procedures from which he sought to gain?

In sum, it appears that each tissue withdrawal was subject to a valid medical or research consent, purpose and use. It further appears that had plaintiff known the defendants' alleged full intention, he would still, in all probability, have consented to the recommended medical treatment. Finally, he knew research would be, and was being, conducted. Indeed, he expressly and tacitly consented to it.

In sustaining defendants' demurrer to the Second Amended Complaint, in addition to repeating its request for clarity on the above issues, this Court indicated several further concerns, including:

1) That there was a "commingling of alleged conduct by defendants . . . regarding the use of tissue after its removal as distinguished from the act of removal and their intent at the time it was removed." (TR[5] 6:8-14.)

2) That the pleading did not disclose "what the roles of the various defendants are." (TR 27:9-12.) Referring to Golde and Quan, "if one or both of those defendants played no role in the decision to remove tissue or bodily substances from plaintiff, they could not successfully be alleged to have had wrongfully done that." (TR 29:4-15.)

3) And, that the charge that defendants "misled" plaintiff "doesn't match up with the state of the pleadings at the present time, to the extent that they affirmatively told him one thing and did something else. Now, if that is a fact, it should be alleged." (TR 42:26-43:2.)

Plaintiff's Third Amended Complaint fails to respond to those specific requests. There is no distinction made between the defendants' intention in the act of removing plaintiff's spleen and the subsequent use of it after removal. Plaintiff does *not* allege any wrongful intent in that removal. He alleges an intent to scientifically study the diseased tissue after therapeutic removal, *and* a generalized awareness that research results might have some commercial utility. There is no allegation defendants knew that this particular research would have any such result. Indeed, how could defendants know of such, prior

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[5] "TR" designates "Reporter's Transcript of Proceedings" for the June 12, 1985 hearing on defendants' demurrer to the Second Amended Complaint.

to the splenectomy and any examination of the spleen! What plaintiff complains of is the University's failure to speculate about yet unknown research results.

Further, notwithstanding the extraordinary discovery permitted during this pre-pleading stage of the case, including the lengthy depositions of Golde and Quan, plaintiff still fails and refuses to distinguish between the conduct of the defendants. In particular, Shirley G. Quan is not the subject of *any* allegation other than her general description (TAC ¶3) as an employee of The Regents.

Finally, as discussed below (section VI), plaintiff's pleading still fails to allege how he was "misled" by any affirmative misrepresentation. Certainly, after this Court's admonition, if that were a fact – it would have been alleged. As stated during the earlier hearing:

> "THE COURT: You see, one of the problems – and I'm repeating myself, but it is important – with the second amended complaint and the first 50-odd paragraphs is that the court cannot determine, (a) did the patient understand that he was undergoing these tissue withdrawals, et cetera, as part of his care and treatment? (b) did the defendants or any of them at that time, the time of the withdrawal, or before, misrepresent to him that they were doing it for his care but were, in fact, not doing it for that purpose in any way but for some unrelated purpose, and when did those misrepresentations occur, if they occurred, either at the time of withdrawal or subsequent?
>
> Now, those are some of the things I think are going to have to be addressed in the complaint.
>
> MR. GAGE: Very well, Your Honor."

It is no longer "50-odd paragraphs;" it has become 70-odd paragraphs over 36 pages, with no greater explanation of what was said, when it was said, and how it misrepresented what, in fact, occurred, i.e., its falsity.

III. DEMURRER TO THE "CONVERSION" FIRST CAUSE OF ACTION

A. The Essential Averments of Conversion

There are three allegations necessary to state a cause of action for conversion: plaintiff's rightful possession or property interest; defendants' wrongful withholding or conversion; and plaintiff's damage. (*Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 901; see generally, 3 Witkin, Cal. Proc. (2d ed. 1971), Pleading § 564 et seq., pp. 2203-2206.)

B. Plaintiff has no Property Interest in the Subject Matter.

1. Plaintiff has no Property Interest in Therapeutically Excised Human Tissue

Plaintiff claims a possessory or property interest in the pathologic and diagnostic tissue therapeutically removed during the medical treatment of his hairy-cell leukemia disease. Yet no statute or case law creating or granting a right of ownership to such tissue can be found. *To the contrary,* to protect public health, safety and welfare, California Health and Safety Code section 7054.4 expressly provides for the disposal of such tissue, *following scientific use:*

> "Notwithstanding any other provision of law, recognizable anatomical parts, human tissue,

> anatomical human remains, or infectious wastes *following conclusion of scientific use* shall be disposed of by interment, incineration, or any other method determined by the state department to protect the public health and safety." (Emphasis added.)

The State's expressed concern over public health and safety overrides plaintiff's desire to possess the diseased tissue.

Moreover, there is no provision in California statutory law for a "personal property" interest in parts of human beings. (Civ. Code, §§ 654 and 655.) Statutes such as the Uniform Anatomical Gift Act, enacted in California (Health & Saf. Code, § 7150 et seq.), provide for the transfer or organs by *gift*, as a *service*, not a product, to accredited medical schools or universities for education, research, advancement of medical science, therapy and transplantation. There is no provision for sale or purchase within that statutory scheme. Further, the recently enacted "National Organ Transplant Act" (42 U.S.C. § 274(e), P.L. 98-507 (Oct. 19, 1984) 98 Stat. 2339) reflects a strong national public policy against the sale or purchase of human organs by expressly prohibiting such sale and making any effort to do so a criminal offense. Thus there is no statutory right to transfer a possessory interest in parts of human beings, other than by gift or abandonment.

While California courts have recognized certain limited possessory interests in a decedent's body, for purposes of interment, it forms no part of an estate and is not "property" in any commercial sense. (*Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1110; *O'Donnell v. Slack*

(1899) 123 Cal. 285, 289; *Enos v. Snyder* (1900) 131 Cal. 68, 69; *Gray v. Southern Pacific* (1937) 21 Cal.App.2d 240, 246.) Plaintiff's asserted ownership of his tissue is also without foundation in case law. As stated by the court in *Gray*:

> "The action is not one for conversion, nor could it be, as the law recognizes no right of property as such in the dead body of a human being." (21 Cal.App.2d at 246.)

Further, what form of property interest would there be for repugnant material such as diseased tissue? It is its removal and disposition that the patient seeks, not continued possession. In this case, the expressed provision of California Health and Safety Code section 7054.4, committing the disposition of the diseased tissue to the University, expressly contemplating *scientific use*, determines that rightful dominion exercised by the University. Plaintiff had no further possessory or property interest in that excised tissue.

There are several significant public policy considerations that support a determination that plaintiff had no property expectancy in the excised tissue. Such a property interest would predictably have a devastating effect upon patient medical treatment and research for the advancement of medical science. A premium would be placed upon illness and those suffering from diseases would only have their predicament compounded by a false expectancy of a windfall, as plaintiff here tries to assert. Yet, few research efforts actually produced commercial results, and when they do, such results are usually an amalgam of several separate efforts upon diverse materials over several years. It would be pragmatically impossible to determine what material or circumstance

stimulated the University's intellectual research curiosity into one direction, as opposed to some other. And, where a commercially useful product did occur, there would predictably be a string of lawsuits by those who, like the plaintiff, might anticipate a windfall from such an expectancy. Even if a prior agreement were made, they might seek to avoid their consent by an argument of *duress*, or dispute their percentage, or the management of the technology by the University. And just how would the "value" of such tissue be determined? The University's research is a matter of intellectual *curiosity* directed at the advancement of medical knowledge. There is no value to diseased tissue – only to curiosity.

Further, the current medical science community seeks an open exchange and transfer of biological materials for research purposes and, plaintiff's claimed "property expectancy" would have a chilling effect upon that exchange. Clouds of uncertainty would be cast upon all such gratuitous institutional transfers. Scientists, affected by such uncertainty, might find themselves limiting research alternatives such as the combining or re-combining of materials from different sources, as is done in the current hybridoma biotechnology.

Finally, the specter of taking human tissue, diseased or healthy, to the marketplace for barter to the highest bidder is repugnant to public policy and the public's interest, notwithstanding plaintiff's allegation he would do exactly that. No doubt some would point to the potential beneficial uses of any windfall profits, for example, an imporverished [sic] child's education, the downpayment for a home, or some such laudable goal. Nonetheless, one need only imagine an unfortunate patient

suffering from some disease, traveling from medical center to medical center to determine the value to be placed upon the examination of his diseased tissue, or the use of what remains as healthy tissue.

2. Plaintiff has no Possessory or Property Interest in Defendants' Patent

In *Diamond v. Chakrabarty* (1980) 447 U.S. 303, 307 [65 L.Ed.2d 144, 148], the Court noted the purpose and effect of the federal patent laws:

> "The Constitution grants Congress broad power to legislate to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.' Art. I, § 8, cl 8. The patent laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. . . . "

The suggestion that patents are issued *only* to inventors is not new. Nearly one hundred years earlier, in *Thompson v. Boisselier* (1884) 114 U.S. 1, 10 [29 L.Ed. 76, 79] the Court, referring to the same constitutional provision stated:

> " . . . The beneficiary must be an inventor and he must have made a discovery. The statute has always carried out this idea. . . . "

The 1952 Patent Act (35 U.S.C. §§ 1-376) "carried out this idea" with its requirements: that the applicant be the inventor (35 U.S.C. § 102(f)); that applications be made under the authority of the inventor (35 U.S.C § 111); and,

that applicants file an oath asserting he/she is "the original and first inventor" of the invention (35 U.S.C. § 115, 116).

A patentable invention is comprised of both conception and reduction to practice. (35 U.S.C. § 102(g).) Plaintiff does not allege any participation in the conception or reduction to practice of the advancements that are the subject of this lawsuit. Thus plaintiff has no incipient right, title or interest in the granted or pending patents, for lack of inventorship participation. He is simply not the "beneficiary" to whom the patent laws are directed. *Nor* has he alleged any statutory basis for the transfer of any patent right to him, as for example by assignment or grant (35 U.S.C. § 261). And, as noted in *Gayler v. Wilder* (1850) 51 U.S. 477, 494 [13 L.Ed. 504, 511]:

> "[A patent] did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

Thus plaintiff has no "property" right, title or interest in defendants' patent.

Furthermore, while patents are a species of property, their subject matter is intangible, not tangible. Contrary to plaintiff's assertion, the subject matter of the University's patent is not his tissue, but rather is limited to the advancements brought forth by defendant's research upon that tissue. As stated by the court in *Howes v. Great Lakes Press Corp.* (2d Cir. 1982) 679 F.2d, 1023, 1029:

> "Patents are not granted for the natural properties inherent in things existing in nature, although they may be granted for things an inventor does with those properties. . . . "

Thus, a mere discovery of what was inherent, or just unknown, is not patentable. *A patentable advancement must be both previously unknown and previously nonexistent.* (*Compare, Funk Bros. Co. v. Kal Co.* (1948) 333 U.S. 127 [92 L.Ed. 588], *with Diamond v. Chakrabarty, supra,* 447 U.S. 303 [65 L.Ed. 144].) While patentable subject matter includes "anything under the sun", it does so only to the extent it is *"made by man."* (*Chakrabarty, supra.*) Thus, the patent in question, presumed to be valid (35 U.S.C. § 282), reflects *only* the intangible results of the defendants' scientific study.

The circumstance is analogous to an artist's creation of a statue from abandoned or donated wood of a tree. A copyright arises in the artist for the work of art, *not* for the tree or its wood. The copyright affects the wood *only* to the extent the wood is a tangible expression or embodiment of the copyright's intangible subject matter. The nature of the subject matter produced by the artist (protected by copyright law) is the same as that resulting from the University's research (protected by patent law). The value associated with each (the artist's statue and the scientist's research) is awarded to the one creating the intangible subject matter. That is the purpose of the law's requirement that patents issue *only* to inventors and copyrights to artists or authors. There simply is and could be *no* patent issued upon plaintiff's "Blood or Bodily Substance."

Moreover, where the University's invention arises in the course of research conducted pursuant to a United States government research grant the national policy regarding the disposition of such patents is expressed in Title 35 of the United States Code. (35 U.S.C. §§ 200-211.) That statute mandates: the disclosure of all patentable inventions; the University's election to retain or to tender title to the Federal government; the prosecution of patent applications for those inventions retained; a prohibition against the assignment of any retained patent; and the disposition of any royalties derived therefrom, including a mandate to share such royalties with the inventors of the patented advancement. (35 U.S.C., § 202(a) and (c).) That federal policy was established to stimulate the utilization of technological advances derived from federal funding. Those statutory mandates do not contemplate, and indeed would prohibit, any interest of a materialman in the patented intangible advancements arising from federally sponsored research.

Finally, the intangible subject matter of a patent property is not that which can be converted since it is not tangible, nor is it represented in value by a tangible document, such as a stock certificate or bank account pass book (4 Witkin, Summary of California Law (8th ed. 1974), Torts §§ 354, 356 and 357, pp. 2614-2616.) There simply is no "possession" of a patent to be interfered with, other than an action for "infringement" as provided under federal patent laws. (35 U.S.C. § 271.) To the extent plaintiff has sought to do so, his claim for "conversion" of the patent is also contrary to the law for lack of any property interest in plaintiff.

3. There Is No Property Interest In Unpatented Knowledge

Other than as a patented advancement, there simply is *no* legally cognizable *property interest* in intangible knowledge or information derived from research. To the extent plaintiff seeks to claim "conversion" of any intangible knowledge beyond the patent, it is contrary to the law for lack of any "property" subject matter.

C. Defendants Did Not Unlawfully Withhold or Convert Property

As noted above, defendants' disposition and scientific use of the therapeutically excised tissue is expressly contemplated in California Health and Safety Code section 7054.4. Thus defendants have not unlawfully withheld or converted anyone's property.

D. Plaintiff Has Not Been Damaged

What damage does Moore claim? Does he seek the destruction or return of his excised tissue or the cessation of research? No, instead he claims the product of the University's years of research effort, which advanced medical knowledge and in the process produced patentable inventions. While plaintiff's disease and dilemma may have stimulated the University's intellectual curiosity, he does not thereby have a claim of a damage to the products of any resulting scientific inquiry.

Further, in the Third Amended Complaint, plaintiff alleges that defendants' research results were *not* derived

from any "scientific genius . . . nor were they created or *invented*," but were instead the results of routine activity (TAC ¶62). If so, where is plaintiff's damage? If the research results are not inventions, any patent upon them would be invalid.

And, if the patent is valid, plaintiff does *not* allege how it interferes with his ability to take his alleged "unique type of blood and/or blood components with unique genetic material, properties, and unique cells" (TAC ¶1) to *any* biotechnology firm he wishes, under any conditions he may arrange. Plaintiff may do as he pleases for the University's patent applies *only* to that which it invented (i.e., first conceived and actually reduced to practice). There is no legal basis for his alleged interference. Simply put, plaintiff has not been damaged and his allegations do not support any claim of damage.

E. In Any Event, Plaintiff's Claim for Conversion is Barred by the Statute of Limitations

Plaintiff's conversion allegations appear to involve his excised spleen tissue, removed in his October 1976 splenectomy, and his "Blood and Bodily Substances" withdrawn over the course of the following seven years to September 20, 1983. The California statute of limitations for conversion is three years. (Code Civ. Proc., § 338(3).) Assuming, without conceding, that a conversion of the spleen tissue had occurred, it occurred in October 1976, nearly eight years prior to the date plaintiff filed his complaint herein. Taken in the opposite direction, since the complaint was filed on September 12, 1984,

the plaintiff can only claim a conversion for activity that occurred on or after September 12, 1981.

Yet plaintiff claims an interest in all research results involving his therapeutic tissue removed since October 1976, including the Mo cell line and the defendants' patent. The application for the patent was originally filed January 30, 1981 (TAC ¶41(k)), based upon a University invention disclosure in August 1979 (TAC ¶41(f)), nearly two years beyond the statutory period. And certainly the material used in the research leading to the patent's subject matter and the Mo cell line must have, perforce, been accessed prior to the invention's disclosure or application date.

Plaintiff attempts to circumvent the statute of limitations bar by alleging that defendants deliberately and fraudulently concealed their true intentions for economic and commercial purposes. Apparently relying upon the equitable doctrine of estoppel, plaintiff previously argued that a defendant who, by his own wrongdoing, prevents a plaintiff from filing a complaint until after the limitations period has expired will be estopped from raising the statute of limitations as a defense. However, in order to use the excuse of fraud or fraudulent concealment by the defendant, plaintiff is required to plead not only the necessary elements for a fraudulent action[6], *but also*:

> "(1) When the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for

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[6] Defendants assert plaintiff has not sufficiently alleged those elements necessary to a fraudulent cause of action (section VI, below).

> failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." (*Baker v. Beech Aircraft Corp.* (1974) 39 Cal.App.3d 315, 321.)

These allegations must be pled "clearly and unequivocally, and must not rest upon inferences." *Bank of America v. Williams* (1948) 89 Cal.App.2d 21, 25.)

In the Third Amended Complaint, plaintiff alleges he first discovered defendants' intent to obtain a patent for the commercial utility of its research results after the patent issued on March 20, 1984 (TAC ¶56); yet, he admits his awareness (and indeed, consent) to "academic" interest and "scientific medical research," "throughout [his] care and treatment" (TAC ¶35). Plaintiff further alleges that "during each of [his] visits" he sought to inquire whether any of his excised tissues had any "commercial or financial value of significance" (TAC ¶36). Having actual notice of the ongoing research, having consented to the research, and having continuously inquired about the value of his excised tissue as research material, plaintiff had *actual* and sufficient cause to be diligent in inquiring into the University's policies for the disposition of research results; unless, of course, plaintiff had no interest until the research produced meaningful results.

IV. DEMURRER TO THE "LACK OF INFORMED CONSENT" SECOND CAUSE OF ACTION

A. No Claim for Lack of Informed Consent Can Be Stated

Plaintiff's Second Cause of Action alleges that defendants had a duty to obtain his consent prior to any

scientific inquiry involving tissue removed it the course of his medical treatment, and that such consent must include discussion of speculative commercial utility of the yet unknown research results. Plaintiff admits his consent to surgery for his well-being and admits consent to research; but complains that his consent to research was not obtained *prior* to the splenectomy and that "informed consent" was not obtained for any commercial potential of the research results.

Plaintiff's reliance upon the doctrine of informed consent is misplaced. That doctrine exists to guarantee that medical patients and human experiment subjects would know the involved risks and choices regarding medical procedures, including experimental treatment. The history and policy of the doctrine of informed consent does not apply to information regarding the disposition of therapeutically excised tissue, including any research upon it or any potential commercial use of the research results. The informed consent doctrine promotes two values – personal well-being and self-determination.

The law has long protected an individual's physical integrity against unwarranted invasions. This concern for integrity led to the requirement that a doctor obtain the patient's informed consent before medical treatment is rendered. Around the turn of the century, a series of American cases held that medical treatment done without a patient's consent was an assault and/or battery. (*Mohr v. Williams* (Minn. 1905) 104 N.W. 12 (operation on both ears when patient consented to operation on right ear only); *Pratt v. Davis* (I[Il]. 1906) 79 N.E. 562 (total hysterectomy without consent); *Rolater v. Strain* (Okla. 1913) 137 P.96 (removal of bone from foot notwithstanding patient's

expressed disapproval); *Schloendorff v. Society of New York Hospitals* (1914) 211 NY 125, 104 N.E. 92 (removal of tumor although patient consented only to a diagnostic procedure).) However, it was not until 1972 that the informed consent doctrine had a major effect on the health care field. (*Canterbury v. Spence* (D.C. Cir. 1972) 464 F.2d 772; *Cobbs v. Grant* (1972) 8 Cal.3d 229.) In *Canterbury*, an uniformed patient was paralyzed after a laminectomy. In *Cobbs*, an uniformed patient's spleen was injured during an operation, leading to two further surgeries. Both courts held that physicians had a duty to reasonably disclose the alternatives to a proposed medical treatment and the risks inherent in each. (*Canterbury, supra*, 464 F.2d at 782; *Cobbs, supra*, 8 Cal.3d at 243.)

In *Cobbs*, Justice Mosk, speaking for the court, set down the guidelines for the scope of informed consent by stating:

> "[W]e hold, as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices *with respect to proposed therapy* and of the dangers inherently and potentially involved in each." (8 Cal.3d at 243 (emphasis added).)

The *Cobbs* court defined "reasonable disclosure" as sufficient information to permit an evaluation and a decision by the patient weighing the risks, benefits and alternatives against the patient's own individual subjective fears and hopes. (See also *Canterbury, supra*, 464 F.2d at 786.) As stated by the *Cobbs* court:

> "[T]he patient's interest in information does not extend to a lengthy polysyllabic discourse on all

> possible complications. A mini-course in medical science is not required. The patient is concerned with the risks of death or bodily harm, and problems of recuperation." (8 Cal.3d at 244.)

It is *here*, while a patient sorts out such fears and weighs such risks, that plaintiff would have us pause and discuss the University's intellectual curiosity and research interest in diseased tissue, as well as any speculative commercial value of yet unknown research results. And then, to negotiate a reasonable "compensation" arrangement, as we prepare for the therapeutic surgery. The required disclosure under the doctrine of informed consent has *never* included non-medical information such as possible research that is independent of the medical treatment, i.e., to be performed upon diseased tissue after therapeutic removal from the body.[7] And it would become an impossible task if such consent were read to include speculative commercial utility of unknown research results.

Furthermore, as stated by the *Cobbs* court:

> "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises *only if* it is established that had revelation been made consent to treatment would not have been given." (8 Cal.3d at p. 245.)

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[7] California Administrative Code, Title 22, section 707 sets forth the patient's bill of rights and confirms the doctrine of informed consent. It simply requires the physician to give information to include a description of the procedure or treatment, the significant risks and alternative courses of action.

As noted above (section II), plaintiff does *not* clearly allege that his conduct would have been any different, regardless of what he might have been told. He alleges that a disclosure of the intention to conduct research activities *coupled with* a disclosure of the then unknown commercial utility of unknown research results, would have caused him to have "considered" alternatives. His consent to the splenectomy would not have been *solely* for the purpose of medical care. But he still does not deny he would have consented. And, he alleges no change of conduct for the subsequent tissue withdrawals, regardless of what knowledge he had, except for the two written consents for research removals.

The doctrine of informed consent has been extended in application to human subject scientific experimentation and plaintiff may be attempting to state a claim under that statutory authority. In 1978 California enacted the "Protection of Human Subjects in Medical Experimentation Act." (Health & Saf. Code, § 24170 et seq.) While it was enacted two years *after* plaintiff's 1976 splenectomy, it would otherwise *not* apply to plaintiff's operation, since its definition of medical experiment (Health & Saf. Code, § 24174) is limited to matters that occur "in or upon a human subject," *exclusive* of medical treatment. Further, the elements of its required disclosures (Health & Saf. Code, § 24173) regard *risk* to physical well-being and *not* the potential scientific or commercial uses of the research results. The United States Department of Health and Human Services, under its statutory authority (42 U.S.C. § 289 1-3), also established regulations for the protection of human subjects in experimentation. (45 C.F.R. § 46.101 et seq.) Those federal regulations, however, *expressly*

exclude from their requirements, research conducted upon pathologic or diagnostic specimens. (45 C.F.R. § 46.101 (b) (5).)

Plaintiff's Third Amended Complaint simply does *not* allege the lack of informed consent to the risks of the medical splenectomy, or any professional negligence in his treatment. As to the subsequent withdrawals of blood and substances, plaintiff again fails to allege their impropriety as diagnostic treatment, nor does he allege exposure to any physical risks he was not aware of and consented to. Further, he admits consent to the human subject experimentation aspects of his April 11 and September 30, 1983 visits and does not allege any failure to follow statutory mandates. Finally, nowhere does he deny the defendants' stated purpose, to serve plaintiff's medical needs during each of those visits.

Whether viewed from the medical patient or human subject experimentation perspectives, plaintiff has simply not stated a claim under the doctrine of informed consent. Defendants submit that where, as here, access to the tissue was lawful, there is no claim regarding the dominion exercised for the research conducted. There simply is *no* reasonable property expectancy in research results on the part of a patient or research subject that mandates the protection plaintiff suggests. And, there would be no purpose served by a requirement to discuss speculative utility of yet unknown research results under a duty to obtain "informed consent" (medical or research) to the act of removal.

B. Plaintiff Fails to Allege Any Appropriate Damages for the Lack of Informed Consent

Plaintiff does not allege any *personal injury* damage associated with any alleged lack of informed consent. (*Cobbs, supra,* 8 Cal.3d at 240-241; Code Civ. Proc., § 340.5.) Nor does plaintiff allege any statutory damage under California's "Protection of Human Subjects in Medical Experimentation Act" (Health & Saf. Code, § 24176), which permits an award of $1,000 per occasion where informed consent is negligently omitted, $5,000 where it is willfully omitted, and $10,000 where it is willfully omitted and a substantial risk of injury exists, in addition to any personal injury damages that may have occurred. Instead, plaintiff's alleged damage is directed at the University's research results, the University's patent, its economic value and the intangible knowledge gained in the research. The doctrine of informed consent, as a subject of public policy, applies to personal injury risks, and its breach would not include plaintiff's claims for proprietary economic loss measured by the University's patent or other research results.

C. In Any Event, Plaintiff's Claim for Lack of Informed Consent is Barred by the Statute of Limitations

A cause of action for "lack of informed consent" can be stated either as a tort of battery, or as professional negligence. (*Cobbs, supra,* 8 Cal.3d at 240-241.) The distinction may affect the choice of the statute of limitations. (*Ibid.* at 240.) The California statute of limitations for

negligence is three years. (Code Civ. Proc., § 340.5.) However, since plaintiff's amended complaint appears to have been pled in battery and not negligence, the one year statute of limitations might be applicable. (Code Civ. Proc., § 340(3).) As noted above (discussion of the Conversion cause of action, with reference to the alleged circumstances of the University's patent, derived from an invention disclosure of August 1979, and applied for on January 30, 1981, and the circumstances of the 1976 splenectomy), plaintiff's claim is on its face barred by the statute of limitations. Plaintiff's effort to avoid the statute of limitations by alleging misrepresentation or concealment fails to sufficiently plead a fraud cause of action, and on its face displays the absence of diligence.

V. DEMURRER TO THE "BREACH OF FIDUCIARY DUTY" THIRD CAUSE OF ACTION

A. No Fiduciary Duty Owed Plaintiff Has Been Breached

To state a claim for breach of fiduciary duty, plaintiff "must state facts sufficient to establish that defendants bore a fiduciary duty to plaintiff and that defendants violated that duty." (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 436.) Recognizing the difficulty in defining the elements of a fiduciary relationship, the California Supreme Court recently stated that:

> " . . . before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship that imposes that undertaking as a matter of law." (*Committee on Children's Television v. General Food Corp.* (1938) 35 Cal.3d 197, 221.)

Plaintiff's Third Amended Complaint fails to allege facts that would establish a fiduciary duty owed plaintiff in the University's research effort to advance medical knowledge. The University acknowledges the special relationship between physician and patient within the scope of medical treatment, but there is *no statutory or case authority to extend the duty owed a patient into the University's independent scientific investigation,* even if the patient's circumstance stimulated the intellectual curiosity that led to the research. Simply put, medical treatment is directed to and the benefits the patient, while research is directed to and benefits the general public; the University's duty regarding each is separate and distinct.

The professors of medicine at a University medical research center are physician/scientists. They not only owe a duty to the patients they serve, but also to the public at large for the advancement of medical science. When acting for the benefit of the patient – within a physician/patient relationship – they owe a special duty to the patient and anything done in that relationship must include the purpose of the patient's medical care and treatment. But, that is not to say it may not also include a benefit to the public as well, for it would be impossible and undesirable to completely separate the two. *Knowledge and experience gained in patient treatment as a physician naturally stimulates the intellectual curiosity of the research scientist.*

Moreover, plaintiff seeks to establish an impossible duty upon defendants. Plaintiff does *not* allege defendants knew of any value to his diseased spleen prior to its removal and examination. Yet plaintiff would require "informed consent" as to such value and any commercial

utility of such research results *before* its use! The only possible purpose served by such a requirement is plaintiff's continued demand for some control or interest in the University's research direction and results. Such a requirement would elevate the physician relationship beyond reasonable limitation, to the detriment of the scientist's investigation into medical knowledge. The separation between physicians and scientists would be lost, and scientific inquiry would suffer.

Patients come to the University's medical research center reasonably expecting to receive medical treatment incorporating all current scientific research knowledge. Moore traveled from his Alaskan home to the UCLA Medical Center no doubt seeking and expecting that benefit. That expectation quite naturally leads to the *reasonable anticipation* that such ongoing research would continue. Yet, while Moore sought the availability of what preceded him, he would by his claim of "fiduciary duty" seek to control the pursuit of curiosity that might follow his medical treatment. If he could hold those who follow accountable to him, would he not be accountable to those who preceded?

The only analogous case the University has found is *Browning v. Norton-Children's Hospital* (Ky. 1974) 504 S.W.2d 713. There, a hospital patient whose leg was amputated in an operation successfully saving his life, sued the surgeon and hospital for alleged "mental anguish" he suffered upon learning his amputated limb had been cremated. In *Browning*, the court concluded:

> "It seems to the Court that when one consents to and authorizes an operation while a patient in the hospital (absent any specific reservation,

> demand, or objection to some normal procedure), he then and thereby, in effect, accepts all the rules, regulations, and modus operandi of that hospital." (*Ibid.*)

Plaintiff's complaint alleges no pre-operation request, restriction, expressed interest or concern about the disposition of his therapeutically removed tissue. Such silence constitutes implied consent to the University's procedures and an abandonment of any interest the patient may otherwise have. Indeed, even where plaintiff admits his awareness of the research, he alleges no challenge to its conduct *or* question on the disposition of its results.

The University's duty to its patients must be viewed in the context of its duty to the public at large to advance medical knowledge through research. Currently, there are four means by which the University lawfully accesses human tissue for study and testing. Two are *post-mortem* means: the California Anatomical Gift Act (California Health and Safety Code §§ 150, et seq.), and the California Unclaimed Dead Bodies Statute (California Health and Safety Code § 206). And, two are *inter vivos* means, requiring informed consent to any physical risks involved in the access: informed consent to medical treatment (*Cobbs v. Grant* (1972) 8 Cal.3d 229), and informed consent to access for research (California Protection of Human Subject and Medical Experimentation Act, Health and Safety Code §§ 24170, et seq. and appropriate federal regulations). As noted above (section IV) the federal and state human experimentation statutes and regulations *expressly* exclude medical treatment and therapeutic/diagnostic specimens from their purview. Where, as here,

the "scientific use" is expressly contemplated by the statute controlling tissue disposition, there is *no* breach of fiduciary duty by the conduct of scientific testing and research involving specimens of therapeutically excised tissue.

If, in the pursuit of its research duty, fortuitous patentable advancements are brought forth, the University is not "unjustly enriched" nor has it taken any unfair advantage from those who receive its medical treatment. As discussed above, patents are limited to intellectual intangible advancements, and are distinct from both the tangible material used in the research, *and* the tangible product of the research. At this point, it is appropriate to note that the tangible research product itself, is, presumptively, made freely available to the public as part of the patent law requirement for an "enabling disclosure" of the invention. (35 U.S.C. § 112; *In Re Argoudelis* (C.C.P.A. 1970) 434 F.2d 1390; *Feldman v. Aunstrup* (C.C.P.A. 1975) 517 F.2d 1351.) Thus, the University retains ownership *only* over the intangible patent, which represents *only* the intellectual contribution of its research scientist, and that retention is pursuant to federal research policy. (35 U.S.C. § 200.) If instead that benefit were awarded plaintiff, in the face of his lengthy silence, the University's research effort, and federal research funding, such would indeed be a windfall and an unjust enrichment.

Finally, scientific research material can now move freely within the circles of those investigating medical questions. Such studies go on for years, quite probably long past the professor's physician-patient relationship, before any real advancement of knowledge occurs. How could an academic medical center fulfill the obligation

plaintiff suggests? When would the duty of disclosure arise? When curiosity is stimulated? When a speculative idea or conception is formed? Or only after it is proven valid through study and investigation? What if one research effort *merges* into another, or *curiosity changes* the course of research, is there a duty to that which is left behind and not pursued? What if several tissues are studied, combined, or dissected and re-combined in a new order, and the research produced a useful result? How much would be attributable to the investigator's intellect, and how much to the things studied?

The University submits that where, as here, a patient seeks medical treatment at an academic medical research center, there is *no* fiduciary duty owed the patient that conditions the University's independent scientific investigation conducted upon therapeutically removed tissue, or its disposition of the results of research. And, the absence of any expressed request to exclude that tissue from such reasonably anticipatable research, implies consent to the research procedures.

B. Plaintiff Fails to Allege Any Appropriate Damage for Any Breach of Fiduciary Duty

Even assuming a breach of fiduciary duty, plaintiff's claim to the products of the University's research goes beyond his damage. *The years of University research effort was the source of any value that may exist;* plaintiff was at most a stimulus to the intellectual curiosity leading to that research. *His excised spleen tissue had no value,* was committed to the University's disposition, and was abandoned. Plaintiff simply has not been damaged.

C. In Any Event, Plaintiff's Claim for Breach of Fiduciary Duty is Probably Barred by the Statute of Limitations

The statute of limitations for a breach of fiduciary duty depends upon the underlying nature of the right sued on. (*Schneider v. Union Oil Company* (1970) 6 Cal.App.3d 987, 993.) Thus, if plaintiff is basing his claim of breach on the ground of fraud and/or conversion, the period would be three years. That limitation, as discussed above and below, precludes any claim to the University's research results.

VI. DEMURRER TO THE "FRAUD AND DECEIT" FOURTH CAUSE OF ACTION

A. Application of Governmental Immunity

As asserted below (section VIII), pursuant to the California Government Tort Claims Act (Gov. Code, § 814 et seq.), *Regents are absolutely immune* from any claim of injury resulting from any fraud or deceit (Gov. Code, § 818.8). Additionally, Golde and Quan are similarly immune unless their conduct constitutes actual malice or corruption, neither of which are sufficiently alleged in the Third Amended Complaint (Gov. Code, § 822.2).

Nonetheless, defendants proceed with an analysis to demonstrate that should plaintiff claim the ability to assert actual malice or corruption on the part of Golde or Quan, his current judicial admissions conclusively demonstrate that a cause of action for fraud or deceit could not be stated. Thus, the demurrer on the part of all the defendants should be sustained, without leave to amend.

B. The Essential Averments of Fraud and Deceit

The essential averments of fraud and deceit by misrepresentation are: (1) a false representation or concealment; (2) of a material fact *susceptible of knowledge*; (3) made with knowledge of its falsity or in reckless disregard of its truth; (4) with the intent to induce plaintiff's conduct; (5) plaintiff's justifiable reliance; and (6) plaintiff's damage. (*South Tahoe Gas Co. v. Hoffman Land Improvement Co.* (1972) 25 Cal.3d 750, 765; *Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 345.) The necessary allegations for deceit by concealment are essentially the same except that concealment relies upon a duty to disclose and a failure of that duty. The Third Amended Complaint attempts to allege both misrepresentation and concealment.

C. No Claim for Fraud or Deceit has Been Alleged

1. Plaintiff's Allegations

Plaintiff alleges that defendants concealed their "commercial" interests in the results of their research. Plaintiff further alleges that defendants concealed and failed to disclose their intent to conduct research prior to the splenectomy treatment. Notably, he admits his awareness of the research interest, but does not disclose when or how he first became aware of it; although he admits the defendants affirmatively expressed their "academic" and "scientific medical research" interest in plaintiff's "Blood and Bodily Substances" "throughout plaintiff's care and treatment" (TAC ¶35).

In addition to the concealment claim, plaintiff alleges defendants' affirmative misrepresentation that his "Blood and Bodily Substances" had "no economic or commercial value" (TAC ¶36).

2. No Cause of Action for Concealment has Been Stated

As noted above ("Informed Consent" and "Fiduciary Duty"), there was *no duty to disclose* defendants' interest in scientific testing and research involving therapeutic tissue, or to disclose what was obviously unknown before the tissue was removed (i.e., any speculative value to yet unknown research results). Absent a duty to disclose, no cause of action for fraud or deceit by concealment can be stated. Plaintiff repeatedly alleges defendants concealed "research and commercial" activities; yet, no such activity is alleged prior to 1980, and there is no allegation that defendants knew of any commercial utility prior to that date. What was not disclosed by defendants? The unknown and unknowable? What duty could there be for such a disclosure?

3. Plaintiff's Allegations Lack Specificity

Allegations of fraud and deceit must also be clear and unequivocal. Conclusions, ambiguities and generalizations are not sufficient and facts must be pled specifically for each element of the cause of action. (*Norkin v. United States Fire Ins. Co.* (1965) 237 Cal.App.2d 435, 437; *Lesperance, supra,* 217 Cal.App.2d at 344.)

Plaintiff's allegations of concealment, while appearing specific, are hopelessly ambiguous in his attempt to join the matter of "research" with the matter of "commercial" interest in the research results. Plaintiff still attempts to tuck and hide his knowledge of the research conduct, behind a claim he was unaware of any speculative commercial utility in the unknown research results. Plaintiff does *not* allege defendants knew of any value to the unknown research results, prior to the splenectomy. Indeed, while plaintiff alleges "research and commercial" interest throughout the Third Amended Complaint, he alleges *no* specific commercial utility activity until 1980, over three years from the date of his 1976 splenectomy, during which time he admits research was being conducted.

Further, while both a general and special demurrer raise the issue of specificity, the examination under a challenge of special demurrer require facts which show: how, when, where, to whom, and by what means defendants' representations were made; from what data the falsity of defendants' intentions could be inferred; and how, when, where, through whom, and in what circumstances plaintiff become justified in relying on defendants' alleged representation. (*Hill's Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.) Just what is it that defendnts [sic] failed to tell plaintiff, and when did defendants first know it? Plaintiff's allegations of affirmative misrepresentation of economic value are hopelessly uncertain and lack the specificity necessary to demonstrate defendants' wrongful conduct or plaintiff's justifiable reliance on such to his damage.

4. Plaintiff Failed to Allege Materiality of any Misrepresentation

To constitute actionable fraud, the misrepresentation must be of a material fact, i.e., a fact without which the transaction would *not* have occurred. (*Friedberg v. Weissbuch* (1955) 135 Cal.App.2d 750, 754; *Thomas v. Hawkins* (1950) 96 Cal.App.2d 377, 379.) Plaintiff's Third Amended Complaint seems to suggest that plaintiff permitted the withdrawal of his blood and substances upon the representation that such related to his health care, treatment and well-being. *Nowhere* does plaintiff allege *any* conduct taken in *reliance* upon the alleged misrepresentation of the material's value.

5. Plaintiff's Misrepresentation Allegations do not Demonstrate Falsity, or Defendants' Knowledge of Falsity

Generally the misrepresentation must be one of *fact*. A *prediction* of future events is usually regarded as a nonactionable expression of opinion. (*Wolleson v. Coburn* (1923) 63 Cal.App. 315, 323; *Holton v. Noble* (1890) 83 Cal. 7, 8.) The representations must also be false, and known to be false (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811), or made in reckless disregard of truth or falsity (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 487). Falsity and knowledge is determined as of the time when the representation was relied upon, and not as perceived in light of subsequent events. (*Le Clercq v. Michael* (1948) 88 Cal.App.2d 700, 703; *California Credit & Collection Corp. v. Bernardini* (1926) 77 Cal.App. 381, 384-4.) There can be no retroactive reliance on statements that come to plaintiff's

attention *after* the transaction occurred. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 288; *cert. den.* 348 U.S. 916.)

How would the University have known of any value or that its research might result in a patentable invention? Patentable subject matter is presumptively unknown, nonexistent and nonobvious, prior to its invention. (35 U.S.C. §§ 102 and 103.) Plaintiff suggests, from a position of hindsight, that the University owed plaintiff a duty to disclose what was unknown, nonexistent, and nonobvious. A rather onerous duty indeed, and one which would create a considerable chilling effect upon the research ingenuity, precisely because the effort might succeed and produce something new, something different, as it did in this case.

Even assuming the University represented that plaintiff's bodily substances were of "no commercial or financial value," could that be anything but a reasonably accurate opinion? Indeed, such material was and still is valueless. *It is the University's research effort that produced any matter value.* It is the knowledge that came from that research that is the subject of the patent and represents the matter of value.

Finally, plaintiff alleges the University failed to disclose its intention to patent the invention arising from its research. However, not only are patentable advancements unknown before their invention, prior to the 1980 landmark United States Supreme Court decision in *Diamond v. Chakrabarty* (1980) 447 U.S. 303 [65 L.Ed. 2d 144] there was only uncertainty over whether any such biological subject matter was patentable. And, if a patent or commercial activities were intended, why would or did the

University wait, as plaintiff's pleading alleges, until January 1981 to apply for the patent? Indeed, why would the inventors have waited until August 1979 to file the invention's disclosure with the University (nearly three years *after* plaintiff's splenectomy)? Such a delay could only jeopardize the application and risk loss of patentability under the patent requirements of novelty and nonobviousness. (35 U.S.C. §§ 102 and 103.)

Thus, by the very existence of the University's patent, and the presumptions that arise from it, plaintiff's pleading demonstrates that no actionable misrepresentation or concealment as to the value of his bodily substances could have occurred. There was no fraud or deceit, simply because the alleged subject matter was presumptively unknown and nonexistent at the time.

6. Plaintiff has Not Been Damaged by Any Alleged Fraud or Deceit

Plaintiff *no longer* suggests he would *not* have proceeded with the 1976 splenectomy had he known what was allegedly concealed. He only alleges he would have "considered" his alternatives (TAC ¶25), if he knew what the results of the research would have been (TAC ¶26). And, as noted above, he does *not* allege any change in conduct on the subsequent withdrawals. If he proceeded with the splenectomy, once removed, California Health and Safety Code section 7054.4 committed the subsequent disposition of the diseased spleen to the University's discretion.

Nonetheless, assuming he would have refused to proceed with the splenectomy treatment, actual pecuniary damage is necessary for a recovery based on fraud and deceit. (*South Tahoe Gas Co., supra,* 25 Cal.App.3d at 765.) And, there can be no such damage in the absence of a vested right:

> "One cannot be defrauded of that in which he has no vested right. A vested right is property which the law protects, while a mere expectancy is not property, and therefore is not protected." (*Haldane v. Freedman* (1962) 204 Cal.App.2d 475, 479.)

Plaintiff had no right, much less a vested right, in the results of the University's research.

D. In Any Event, Plaintiff's Claims for Fraud and Deceit Are Barred by the Statute of Limitations

The statute of limitations for fraud and deceit is three years. (Code Civ. Proc., § 338(4).) If, on the face of the complaint, the statute of limitations has passed, in order to avoid a demur plaintiff must plead with particularity: his lack of prior knowledge of the facts; the time and circumstances of his discovery; and, facts displaying his reasonable diligence. (*Casualty Insurance Co. v. Rees Investment Co.* (1971) 14 Cal.App.3d 716, 719-20; *Orange County Rock Prod. Co. v. Cook Bros. Equip. Co.* (1966) 246 Cal.App.2d 698, 703.) As discussed in the analysis of the First Cause of Action for conversion, plaintiff's amended complaint itself demonstrates the absence of diligence, necessary to avoid the demur based upon the statute of limitations. Plaintiff admits his notice of research and his repeated inquiry into the value of his bodily substances,

throughout his treatment; he had sufficient cause to inquire as to the University's policies on the disposition of research results.

VII. DEMURRERS TO THE REMAINING FIFTH THROUGH THIRTEENTH CAUSES OF ACTION

A. Demurrer to the "Unjust Enrichment" Fifth Cause of Action

Unjust enrichment occurs where one obtains a benefit which he may not justly retain. (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 631; *Branche v. Hetzel* (1966) 241 Cal.App.2d 801, 807.) The University was not unjustly enriched. *First*, plaintiff had no property interest to his therapeutically removed tissue. *Second*, he was not entitled to compensation for the use of his tissue specimen in the University's research. *Third*, he has no claim of right, title or interest in the University's patent since his only "contribution" was therapeutically removed tissue committed by statute to the University's disposition, or tissue for which he gave research consent. *Fourth*, his "contribution" was merely fortuitous. *Fifth*, he does not allege any enrichment beyond research knowledge; and, it was the defendants' effort that produced any matter of value there may be in that research. Therefore, any benefits received by the University is justly theirs.

B. Demurrer to the "Quasi-contract" Sixth Cause of Action

A quasi-contract is not a true contract because it lacks assent or agreement by the parties. The law implies or imposes a quasi-contract where one party unjustly

receives a benefit which good conscience would require be reimbursed. (*Harold A. Newman Co. v. Nero* (1973) 31 Cal.App.3d 490, 497.) The doctrine of quasi-contract is founded upon the doctrine of unjust enrichment. (*Gonzales, supra,* 68 Cal.App.3d at 627-28.) Accordingly, since the University was not unjustly enriched, no quasi-contract should be imposed.

C. Demurrer to the "Bad Faith Breach of the Implied Covenant of Good Faith and Fair Dealing" Seventh Cause of Action

> "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. . . . " (1 Witkin, Summary of Cal. Law (8th Ed. 1973) Contracts § .476 P.493.)

Plaintiff alleges a contractual relationship for "medical care in the treatment and monitoring of [his] condition" (TAC ¶91). *Nowhere* does plaintiff allege any breach or failure in his receiving that "benefit." Indeed, plaintiff does *not* allege a covenant of benefit that should be implied and was breached by defendants (TAC ¶99). Plaintiff's attempt to allege a tortious breach of the implied covenant of good faith, by pleading a "special relationship" (*Wallis v. Superior Court* (1984) 160 Cal.App.3d 1109, 1116-1119) is insufficient for his failure to allege any breached implied covenant. Plaintiff alleges *no* refusal or denial of any medical benefit or service for his treatment, whether previously known or derived from the University's research. And, plaintiff alleges *no* contractual basis for a claim to the *independent* scientific research of the University.

D. Demurrer to the "Intentional Infliction of Emotional Distress" Eighth Cause of Action

The essential averments for a claim of intentional infliction of emotional distress include "extreme and outrageous conduct" by defendants, with either the intentional causing, or reckless disregard of the probability of causing, emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) Liability is not imposed unless the conduct is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid.*) The court may determine in the first instance that a jury could not reasonably find the defendants' conduct so extreme and outrageous as to permit recovery under such a claim. (*Golden v. Dungan* (1971) 20 Cal.App.3d 295, 308-9.)

In the instant case, plaintiff alleges the University's research on specimens of therapeutically removed tissue. And, the allegations of misrepresentation and concealment only regard the value of these specimens and the intention to exercise dominion over the results of such research, and no other conduct. *Indeed,* plaintiff alleges that he consented to the research (although under an alleged misunderstanding about its economic worth). Clearly, the complaint does not allege "extreme and outrageous conduct" comprising a cause of action for the intentional infliction of emotional distress.

E. Demurrer to the "Negligent Misrepresentation" Ninth Cause of Action

As noted below (section VIII), under the California Government Tort Claim Act, defendants are *all* absolutely

immune from plaintiff's claim of injury arising from any negligent misrepresentation.

F. Demurrer to the "Intentional Interference with Prospective Advantageous Economic Relationship" Tenth Cause of Action

The necessary averments for a claim of interference with prospective economic advantage are: (1) an *existing* economic relationship containing the probability of future economic benefits; (2) *knowledge* by the defendant third party of the existing relationship; (3) the defendant's intentional conduct designed to disrupt the relationship; (4) actual *disruption* of the relationship; and (5) damage to the plaintiff proximately caused by the defendant's conduct. (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827.) Quite simply put, this tort requires the existence of an economic relationship which is known to, and disrupted by, the defendants. Plaintiff fails to allege any of those requirements.

G. Demurrer to the "Slander of Title" Eleventh Cause of Action

The necessary elements for a slander of title claim include an unprivileged publication of an untrue disparagement to another's property that foreseeably would and does impair the vendibility of the property. (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 262-3.) Since plaintiff has no reasonable property expectation in tissue

removed with consent, or in the results of the University's research, this cause of action would fail. Furthermore, plaintiff fails to allege any *disparagement* to his "property" or the loss of its *vendibility*.

H. Demurrer to the "Accounting" Twelfth Cause of Action

A claim for an accounting is a remedial action, totally dependent upon the existence of a relationship and duty between the parties. Thus, plaintiff's claim rests upon the prior determination of his "property interest" or his claimed "fiduciary duty" regarding the University's research results. Furthermore, a claim for accounting must also allege plaintiff's prior demand for an accounting and its refusal by the University. (*Wooster v. Nevills* (1887) 73 Cal. 58, 60.)

I. Demurrer to the "Declaratory Relief" Thirteenth Cause of Action

The necessary averments for declaratory relief must demonstrate that the subject matter is appropriate and that an "actual present controversy" exists over the subject. (*Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947; Code Civ. Proc., § 1060.) Plaintiff's complaint simply does *not* identify the subject of his alleged "dispute" with the University. Is it the substances removed from his body during consented medical treatment? Is it the Mo cell line that resulted from the University's research, and which (by presumption of the federal patent laws) is made available to the public domain? Or, is it the patent issued to the University as a result of its research effort?

This "essential part" of the claim for declaratory relief, describing the dispute, must be "pleaded specifically." (*Ibid.*)

VIII. DEMURRER TO ALL CAUSES OF ACTION BY CLAIM OF IMMUNITY

A. Immunity Under the California Government Tort Claims Act

The California Government Tort Claims Act (Government Code §§ 814, et seq.) establishes absolute public entity immunity for claims of tort, except as provided in the statute (Government Code, §815). *And*, while a public entity may be liable for the conduct of its employees within the scope of their employment, it is *absolutely immune* for claims of misrepresentation; it is:

> "*not* liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be *negligent* or *intentional*."
>
> (Government Code § 818.8, emphasis added.)

In addition, public entities are absolutely immune from exemplary or punitive damages (Government Code, § 818).

A public employee is:

> "*not* liable for an injury caused by his misrepresentation, whether or not such misrepresentation be *negligent* or *intentional, unless* he is guilty of actual fraud, corruption, or actual malice."
>
> (Government Code, § 822.2, emphasis added.)

In defining the scope of the "actual fraud," exception to the public employee immunity, the court in *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 410 stated:

> "Accordingly, we hold that the immunity afforded by Government Code section 822.2 applies unless, in addition to the essentials of common law deceit, a public employee is motivated by corruption or actual malice, i.e., a conscious intent to deceive, vex, annoy or harm the injured party in his business."

In its footnote 9 to that quote, the court noted:

> "Penal Code section 7 defines malice as importing 'a wish to vex, annoy, or injure another person, or an intent to do a wrongful act.' 'Actual malice' is defined by Civil Code section 48a, subdivision 4(d) in the context of defamation, as a 'state of mind arising from hatred or ill will toward the plaintiff.' "
>
> (*Ibid.*)

Thus, the reference to "actual fraud" in that statutory context is the equivalent of "corruption or actual malice." Otherwise, as the *Schonfeld* court noted, the statute would be rendered meaningless.

That immunity from negligent and intentional misrepresentations for public entities and public employees, includes all four forms of fraud and deceit: intentional misrepresentation, negligent misrepresentation, concealment and a promise made without the intention of performance. (Case citation *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 670-71.)

B. Application of Immunity to the Plaintiff's Claims

In *Johnson v. California* (1968) 69 Cal.2d 782, 799-800, the court noted the particular "commercial interest" aspect of the misrepresentation immunity:

> "In short, 'misrepresentation,' as a tort distinct from the general milieu of negligent and intentional wrongs, applies to *interferences with financial or commercial interests*. The Legislature designed section 818.8 to exempt the governmental entity from this type of liability."
>
> (Emphasis added.)

In *Johnson*, the California Supreme Court relied upon *United States v. Neustadt* (1961) 366 U.S. 696, 711, n.26, where the Court (quoting Dean Prosser) similarly noted that "misrepresentation" as a separate tort:

> " 'has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' "

The Regents is expressly a "public entity" under the California Government Tort Claims Act (Gov. Code, § 811.2). Its employees are public employees. Pursuant to that Act, The Regents is *absolutely immune* from any claim of injury arising from any negligent or intentional misrepresentation and any claim for punitive damages. Moreover, since plaintiff does *not* allege medical malpractice, *admits consent* to the medical treatment and seeks to avoid that consent *solely* by reference to the alleged negligent or intentional misrepresentations, the immunity would likewise apply to *all* the causes of action stated by

plaintiff. Thus, The Regents is absolutely immune from all claims asserted by plaintiff because each is dependent upon the alleged negligent or intentional misrepresentation.

Likewise, Golde and Quan are immune from the misrepresentation claims, as well as the other claims relying upon a claim of misrepresentation. Plaintiff has not alleged any conduct inconsistent with appropriate and proper medical treatment. He simply does *not* allege facts that would constitute conduct on which Golde *or* Quan could be said to be "guilty" of the ill-will or purpose to harm that would comprise corruption or actual malice in their conduct towards him.

Since each cause of action is dependent upon a finding of intentional or negligent misrepresentation (substantively and to avoid the application of the statute of limitations); and since there is *no* alleged personal injury as a result of any claimed medical malpractice or professional negligence; and since plaintiff's entire claim is for alleged commercial and financial interest damage; the defendants' demurrer based upon immunity for each and all the defendants should be sustained.

IX. REQUEST THAT DEMURRERS BE SUSTAINED WITHOUT LEAVE TO AMEND

The Third Amended Complaint is plaintiff's fourth effort to state a claim against defendants, over a 13-month period. The original Complaint, containing three causes of action, was filed September 12, 1984. Prior to a hearing on the University's demurrer to that complaint, plaintiff filed his First Amended Complaint, containing

twelve causes of action, in early December 1984. At that time, plaintiff initiated formal discovery, in addition to his prior informal access to his medical records. Following the University's demurrer, plaintiff filed his Second Amended Complaint, again containing twelve causes of action, in early April 1985. Following a demurrer to that third version, this Third Amended Complaint, now containing thirteen causes of action, was served on October 24, 1985.

Formal discovery conducted by plaintiff since December 1984 includes: a five and one-half day deposition of defendant Golde (four and one-half days with The Honorable Joseph Wapner as referee); a four day deposition of defendant Quan; a full day deposition of The Regents' custodian of Records; over one hundred pages of responses to plaintiff's interrogatories; and, the production of approximately 40,000 pages of documents responsive to plaintiff's six three-category document production request. (See the Declaration of Allen B. Wagner filed herewith.)

With that amount of discovery, stretching over nearly a year, and with four opportunities, if plaintiff has not yet stated a legally cognizable claim, defendants' demurrers should be sustained *without leave to further amend*. If he has not yet stated his best case, why not? If he has and it fails, what purpose is served by further delay? There is little, if anything, to be gained by having this case languish through the busy pre-trial and trial calendars of this Court.

While the University does *not* agree with plaintiff's allegations regarding the defendants' intentions, we do

believe the issue of law raised by these demurrers, and appearing on the face of the complaint, renders any further question irrelevant. Plaintiff simply fails to allege the breach of any *duty* owed plaintiff or the interference of any *property* right he may have.

X. CONCLUSION

John Moore came to the University of California, Los Angles Medical Research Center, and specifically to Professor Golde, seeking their assistance because of their knowledge and fame for scientific research. He sought to benefit from all the University's research that preceeded his visit. Now, by this action, Moore seeks to hold the source of that knowledge captive and those that might follow accountable to him. He claims a right, title and interest to the results of the University's research that followed his visit.

Moore does *not* deny receiving the best medical attention available for his hairy-cell leukemia. He asserts *no* medical malpractice or professional negligence. He does *not* object to the fact that research was conducted; indeed, he admits he always knew is was going on, and admits his express as well as tacit consent to it.

Moore's complaint is based upon two claims, one of which is a waived property claim, while the other is an admitted impossible duty:

First, Moore asserts a property interest by claiming he never consented to research conducted upon his therapeutically removed spleen; however, his subsequent behavior demonstrates his waiver of that claim and an

approval of the research, both expressly *and* tacitly (for he admits knowledge of the research throughout his treatment).

Second, Moore asserts a breach of duty by claiming he was never told of the speculative value, including possible commercial utility, of unknown research results; however, after extensive discovery, he alleges *no* such commercial utility, or defendants' knowledge of commercial potential, prior to 1980, over three years after his splenectomy, during which time research was conducted with his knowledge and without objection. Moore's complaint then is merely that the University did not discuss speculative value or utility of unknown research results. Could there be such a duty?

Moore's diseased tissue was a single event in an endless chain of circumstances that stimulate and affect the course and direction of the University's research for medical knowledge. Others came before him and others have already followed the presentation of his disease. Such research would not be necessary or pursued if, as plaintiff seems to suggest, the results were known beforehand. And, there would be no purpose or policy supporting the award of a patent to the source of such research curiosity.

Moore does *not* seek anything that was or is his by any right or claim. He seeks the product of the University's intellect without any contribution beyond the presentation of his fortuitous disease. If he has such a claim, where and how would such claims end? If the presentation of a deformed knee stimulates the intellectual curiosity of an orthopedic surgeon into designing a new and

patentable artificial knee joint, would the patient have any claim of right, title or interest in the patent? What if the new knee joint was the product of years of orthopedic work, would all those precedent patients have such a claim? Obviously not. Any dominion or property right exercisable over such advancements in knowledge goes only to those that conceive and reduce to practice useful solutions to problems – they are not rewards for the problems themselves.

Thus, Moore's complaint seeks what is not his and, in order to state such a claim, he must allege the impossible – defendants' knowledge of the unknown and unknowable. He does not, and indeed could not, so allege. His pleading then is a non sequitur, for the allegations fail to state a legally congnizable claim against the defendants. The University respectfully submits the question – with a request that their demurrer be sustained, this time, without leave to further amend.

Dated: November 21, 1985.

DONALD L. REIDHAAR
CHRISTINE HELWICK
ALLEN B. WAGNER
DAVID M. BIRNBAUM

By /s/Allen B. Wagner
Allen B. Wagner
Attorneys for Defendants

Appellate No. B021195

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

Appellate No. B021195

APPELLANT'S OPENING BRIEF

Consolidated Appeal From Separate Judgments
of the Superior Court of Los Angeles County
The Honorable Warren H. Deering and
John L. Cole, Judges

LAW OFFICES OF GAGE, MAZURSKY,
SCHWARTZ, ANGELO & KUSSMAN

By: SANFORD M. GAGE
CHRISTOPHER E. ANGELO
JONATHAN T. ZACKEY

9454 Wilshire Boulevard, Fifth Floor
Beverly Hills, California 90212
(213) 273-0904

Attorneys for Plaintiff
and Appellant

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES vii

I. PREFATORY STATEMENT 1

II. STATEMENT OF THE CASE 2

A. PROCEDURAL HISTORY 2

1. Order of Dismissal and Entry of Judgment Thereon of Plaintiff's Action Against Defendants The Regents, Golde and Quan 2

2. Order of Dismissal and Entry of Judgment Thereon Of Plaintiffs Action Against Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation 4

3. Consolidation of These Appeals 4

B. STATEMENT OF FACTS AS ALLEGED IN PLAINTIFF'S THIRD AMENDED COMPLAINT 5

1. Plaintiff's Blood Cells Have Unique and Commercially Valuable Properties 5

2. Plaintiff Entered Into a Physician-Patient Relationship With Defendants The Regents, Golde, and Quan Which Continued For a Seven Year Period From 1976 to 1983 6

3. The Defendants Acquired and Maintained Access To Specimens of Plaintff's Unique Blood Cells Throughout the Seven Year Period By Virtue of Their Physician-Patient Relationship With Plaintiff 7

4. The Defendants Discovered the Unique and Commercially Valuable Characteristics of Plaintiff's Blood Cells and Grew Them In The Laboratory For Their Own Use 7

5. The Defendants Did Not Inform Plaintiff Of The Unique and Valuable Properties Of His Cells 9

6. Defendants Golde, Quan and The Regents Applied for and Had Issued To Them A U.S. Patent On Plaintiff's Cells, But Did Not Inform The Plaintiff 10

7. Defendants Golde and The Regents Negotiated And Entered Into Lucrative Contracts With the Biotechnology Firm Defendant Genetics Institute for the Commercial Development of Plaintiff's Cells, But None of the Defendants Ever Informed Plaintiff or Gave Him the Opportunity to Participate 11

8. The Defendants Added A Multinational Pharmaceutical Firm, Defendant Sandoz, To These Agreements To Further Their Plans To Commercially Develop and Market Products Based Upon Plaintiff's Cells, But None of The Defendants Ever Informed Plaintiff Or Gave Him the Opportunity To Participate 12

9. Defendants Genetics Institute and Sandoz Knew Or Should Have Known That the Unique Cells Which Were The Subject Of Their Commercial Agreements Came From Plaintiff Alone, And Were Obtained By Their Co-Defendants Golde and The regents By Virtue Of Their Physician-Patient Relationship With Plaintiff .. 13

10. None Of The Defendants Ever Obtained Plaintiff's Informed Consent To Their Commercial Research Activities Utilizing His Unique Blood Cells 14

11. The Defendants Have Gained Significant Financial and Competitive Advantages In The Biotechnology Field By Their Exploitation Of Plaintiff's Cells Without His Knowledge Or Consent 15

12. Plaintiff's Property Interests Have Been Damaged By The Defendants Due To Their Conversion and Breach Of Duty, And Plaintiff Has Been Precluded From Receiving His Contributive Share Of The Profits Generated By The Commercial Exploitation Of His Unique Cells 16

III. ARGUMENT 17

A. SUMMARY OF ARGUMENT 17

B. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR CONVERSION 19

1. Definition of the Tort of Conversion .. 19

2. Necessary Elements of a Cause of Action for Conversion 20

a. Ownership or Right to Possession of Tangible Property 20

b. Plaintiff Specifically Alleges Ownership and/or the Right to Possession of His Blood and Bodily Substances..... 20

c. Plaintiff's Blood and Bodily Substances, as Described in the Complaint, are a Species of Tangible Personal Property Capable of Being Converted 21

i. Conversion Does Not Require Proof of Prior "Wrongful" Intent..... 22

ii. The Defendants Exercised Dominion Over Plaintiff's Blood and Bodily Substances In Derogation of His Rights Therein and Excluded Him from Control..... 25

d. Defendants' Use of Plaintiff's Blood and Bodily Substances Clearly Exceeded Whatever Limited Authorization Was Given by Plaintiff ... 25

i. Defendants' Use of Plaintiff's Blood and Bodily Substances Exceeded the Written Consents Given by Plaintiff to Their Removal 28

ii. Defendants' Activities in Patenting and Commercially Exploiting Plaintiff's Unique Cells Clearly Exceeded Whatever Authorized Use Can Be Inferred from Plaintiff's Acquiescence to Their Removal in Connection with His Health Care 28

e. Plaintiff has Properly Alleged Damages Stemming from Defendants' Conversion of His Blood and Bodily Substances 31

f. Plaintiff has Properly Alleged Facts Supporting a Claim for Punitive Damages 32

C. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR LACK OF INFORMED CONSENT 32

1. The Allegations of the Third Amended Complaint Set Forth a Cause of Action for Failure to Obtain Informed Consent Under Accepted Common Law Principles 33

a. The Common Law Doctrine of Informed Consent and the Fiduciary Duty of Full Disclosure 33

b. Due to the Fiduciary Nature of the Physician-Patient Relationship, the Scope of Disclosure is Not Limited To Physical Risks 35

c. Failure to Fully Disclose the Physician's Non-Therapeutic Activities or Purposes Vitiates a Patient's Consent to Medical Treatment 37

2. Plaintiff Sets Forth a Cause of Action for Defendants' Failure to Obtain Plaintiff's Informed Consent Under Applicable Federal Laws and Regulations Governing Federally-Funded Human Research 41

a. The Applicable Informed Consent Requirements for Federally Funded Research Involving Humans 41

b. Defendants' Withdrawal and Use of Plaintiff's Unique Cells for Research and Commercial Use Without His Informed Consent Violated Applicable Federal Regulations..... 43

3. Plaintiff's Third Amended Complaint Sets Forth a Cause of Action for Lack of Informed Consent Under the California Protection of Human Subjects in Medical Experimentation Act..... 48

D. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS FOR A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY..... 50

a. The Physician-Patient Relationship is Fiduciary in Nature..... 50

b. As Fiduciaries, Physicians are Obligated to Render Full and Fair Disclosure to Their Patients 51

c. All Transactions Between Physician-Fiduciaries and Patient-Beneficiaries Must Meet Strict Standards of Good Faith and Fair Dealing, and are Subject to Close Judicial Scrutiny..... 52

d. Breach of Fiduciary Duty Constitutes Constructive Fraud 55

e. Lack of Negligence or Dishonesty of Purpose by the Fiduciary Defendant Does Not Negate the Breach of Fiduciary Duty or Constructive Fraud 56

f. Breach of Fiduciary Duty Can Be Attributed to All Participants in a Common Plan as Aiders and Abettors 57

g. Breach of Fiduciary Duty Entitles the Wronged Beneficiary to a Constructive Trust and Punitive Damages 58

E. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR FRAUD AND DECEIT..... 59

1. Allegations Constituting the Elements of a Cause of Action For Actual Fraud... 60

2. Allegations Setting Forth the Elements of a Cause of Action for Constructive Fraud..... 62

i. The Corporate Defendants are Equally Liable for Fraud Where They Aided and Abetted a Breach of Fiduciary Duty by The Medical Co-Defendants, or Accepted the Benefits of That Fraud 65

ii. Sufficient Allegations of Damages are Presented to Support a Cause of Action for Actual or Constructive Fraud 65

F. PLAINTIFF'S COMPLAINT SETS FORTH SUFFICIENT ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE FO ACTION FOR DECLARATORY RELIEF 66

IV. CONCLUSION 73

TABLE OF AUTHORITIES

PAGE

CASES

Barrett v. Bank of America, 183 Cal.App.3d 1362 [1986] 56, 63, 64

Bennett v. Hibernia Bank, 47 Cal.2d 540 [1956]. 51, 67

Berkey v. Anderson, 1 Cal.App.3d 790 (1969) 34, 50

Beverly Finance Company v. American Casualty Company of Reading, Penn., 273 Cal.App.2d 259, [1969] 24

Bowman v. McPheeters, 77 Cal.App.2d 795 (1947) 34, 36, 50, 51

Brown v. Bleiberg, 32 Cal.3d 426 (1982) 36

Brown v. Regents of University of California, 151 Cal.App.3d 982 [1984] 35

Certified Grocers of California, Ltd. v. San Gabriel Valley Bank, 150 Cal.App.3d 281, at 289 [1983]. 57

Cobbs v. Grant, 8 Cal. 3d 229 (1972)...33, 35, 37, 38, 39

Cole v. Wolfskill, 49 Cal.App.52 (1920) 54

County of Santa Cruz v. McLeod, 189 Cal. App. 2d 222 (1961) 64

Crayton v. Superior Court, 165 Cal.App.3d 443 (1985) 63, 64

Cyrus v. Haveson 654 Cal.App.3d 306 [1976] 31

Darrow v. Robert A. Klein and Co., 111 Cal.App. 310, at 315-16 [1931] 55

De Vries v. Brumback, 53 Cal. 2d 643, 647, [1960]..... 19

Ebaugh v. Rabkin, 22 Cal.App.3d 891 at 895 [1972] 65

Edwards v. Jenkins, 214 Cal 713 (1932) 24

Estate of Arbuckle, 98 Cal.App.2d 562 [1950] 55, 56

Fagerstedt v. Continental Insurance Company, 266 Cal.App.2d 370, at 372 [1968]..... 66

Farraro v. Pacific Financial Corp., 8 Cal.App.3d 339, 351 [1970]..... 32

Fish v. Security-First Nat. Bank of Los Angeles, 31 Cal.2d 378 [1948]..... 54

Freedman v. Queen Insurance Co. of America, 56 Cal.2d 454 (1961)..... 27

Garlock v. Cole, 199 Cal.App.2d 11 [1962]..... 34, 50, 51

Gruber v. Pacific States Savings and Loan Co., 13 Cal. 2d 144, 148 [1939]..... 19

Haun v. Hyman, 223 Cal.App.2d 615, 619-20 [1963] 32

Heckman v. Ahmanson, 168 Cal.App.3d 119 (1985).... 57, 58

Hitchcock v. McElrath, 72 Cal. 565 (1887)..... 26

Igauye v. Howard, 114 Cal.App.2d 122, (1952)..... 20

In re Cheryl E., 161 Cal.App.3d 587 (1984)..... 60

In re Dorrity's Will, 118 Misc. 725, 194 NYS 573, at 575..... 56

In re Wickes, 139 Cal. 195 (1903)..... 53

Kramer v. Biddleson, 257 Cal.App.2d 720 at 724 [1968]..... 58

Krose v. Hillenbrand, 88 Cal. 473, at 474 [1891]..... 53

Krueger v. Bank of America, 145 Cal.App.3d 204, (1983)..... 31

Krusi v. Bear, Stearns and Company, 144 Cal.App.3d 664, [1983]..... 24

Lortz v. Connell, 273 Cal.App.2d 286, 301 [1969]..... 66

Maguire v. Hibernia Savings and Loan Society, 23 Cal.2d 719, 728 [1944]..... 66, 67

Molko v. Holy Spirit Association for the Unification of World Christianity, 179 Cal.App.3d 450 (1986)..... 60

Morissette v. United States, 342 U.S. 246, 270 (1952).... 24

Neal v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal. 3d 176, at 188-89 [1971]..... 51

Nelson v. Gaunt, 125 Cal.App.3d 623 [1981] 54, 55, 59, 60

Nicholson v. Rose, 106 Cal.App.3d 457 [1980]..... 65

O'Hara v. Western Seven Trees Corp., 735 Cal.App.3d 798, at 806, [1977] 65

Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d 226 at 235 [1944] 51

Pepitone v. Russo, 64 Cal.App.3d 685 at 688 [1976] 58

Poggi v. Scott, 167 Cal. 372 (1914) 23, 24

Pope v. National Aero Finance Co., 236 Cal.App.2d 722, 731, [1965].....19, 20

Rains v. Superior Court 150 Cal.App.3d 933 [1984] 17, 36, 37, 38, 39

Smith v. Superior Court of Los Angeles County, 151 Cal.App.3d 491 (1984) 71

Taylor v. S. & M. Lamp Company, 190 Cal.App.2d 700 (1961) 71

Tiburon v. Northwestern Pacific Railroad Company, 4 Cal.App.3d 160, 163 [1970]..... 66

Tide Water Assoc. Oil Co. v. Superior Court, 43 Cal. 2d 815, at 827 [1955] 57

Truman v. Thomas, 27 Cal. 3d 285 (1980)..... 35

United States v. Stockton, 788 F.2d 210 (4th Circuit 1986).....19, 24

Walters v. Marler, 83 Cal.App.3d 1 [1978]..... 65

Werschkull v. United California Bank, 85 Cal.App.3d 981 (1978)..... 52, 54, 55

Wilson v. Board of Retirement, 156 Cal.App.2d 195 [1957] 67

CALIFORNIA CODES

Cal. Prob. Code § 16004 [a] and [c] 54

Civil Code §3517 72

Civil Code §3523 71

Civil Code §333 and §1709 65

Civil Code §1573 62

Civil Code §3336 ..... 30, 31

Civil Code §663 21

Civil Code §§657, 658 21

Code of Civil Procedure, Section 1060 66

Protection of Human Subjects in Medical Experimentation Act of California (California Health and Safety Code, §24170 through 24179.5 ..... 48, 49

FEDERAL REGULATIONS

39 Fed. Reg. 18,914, 18,917-20 (1974) 42, 44, 45, 47

45 C.F.R. §46.116 ..... 43, 47, 48

45 C.F.R. §§46.101 [b] 47

45 C.F.R. §46.3 [b] 45

45 C.F.R. §46.3 [c] [1] (1975) 45, 46

45 C.F.R. §46.101 [b] [5] [1982] 45

45 C.F.R. §46.9 [1975] 42

45 C.F.R. §46.3 [c] [1975] 44

45 C.F.R. §46.116 [b] [5] [1982] 43

45 C.F.R. §46.1 [a] [1975] 42

46 Fed. Reg. 8366, 8386-91 [1981] 45, 47

46 Fed. Reg. 8366 [1981] 42

46 Fed. Reg. 8366, 8386-91 [1981] 43

SECONDARY SOURCES

61 Am. Jur. 2d "Physicians, Surgeons, and Other Healers", §168 [1964] 53

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Restatement (2d) of Torts (1965), §223, Comment (b) 22, 23

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I. PREFATORY STATEMENT.

This is a Consolidated Appeal by John Moore from two separate Orders of Dismissal and judgments entered thereon following the sustaining of Demurrers by the Los Angeles County Superior Court in an action instituted by John Moore against Defendants The Regents of the University of California, David W. Golde, M.D., Shirley G. Quan, Genetics Institute, Inc., Sandoz, Ltd., Sandoz United States, Inc., and Sandoz Pharmaceuticals Corporation for damages and declaratory relief.

After the Demurrer of Defendants The Regents, Golde and Quan to Plaintiff's Third Amended Complaint was sustained with leave to amend, Plaintiff advised the court that he would stand on the complaint, and accordingly the Superior Court, the Honorable Warren H. Deering presiding, entered an Order Dismissing Action against Defendants The Regents, Golde and Quan Only and Judgment for those Defendants thereon on March 19,

1986. (CTR 1050-1051).* Plaintiff and Appellant filed a timely Notice of Appeal on May 15, 1986. (CTR 1056-1058).

After sustaining without leave to amend the subsequent and separate Demurrers of Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation, the Superior Court, the Honorable Judge John L. Cole presiding, entered and filed an Order of Dismissal of Plaintiff's Action against those Defendants on July 2, 1986. (CTGS 801-804). Plaintiff and Appellant filed a timely Notice of Appeal on August 28, 1986. (CTGS 805-811).

On December 5, 1986, following Plaintiff-Appellant's Motion for Consolidation, the Court of Appeal, the Honorable Presiding Justice Woods, ordered that the appeals of these dismissals filed on May 15, 1986 and August 28, 1986 be consolidated.

Plaintiff effectuated service upon Defendant Sandoz, Ltd., a Swiss corporation, which moved to quash said service. That motion was granted, and Plaintiff has filed a notice of appeal of that ruling.

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*For purposes of this consolidated appeal, the parties have stipulated that references to the Clerk's Transcript prepared in response to the Notice of Appeal filed May 15, 1986 from the dismissal of Plaintiff's Third Amended Complaint against Defendants The Regents, Golde and Quan shall be designated at "CTR". References to the Clerk's Transcript prepared in response to the Notice of Appeal filed August 28, 1986 from the dismissal of the same complaint against Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation shall be designated as "CTGS."

II. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY.

1. Order of Dismissal and Entry of Judgment Thereon of Plaintiff's Action Against Defendants The Regents, Golde and Quan.

The Demurrer of Defendants the Regents, Golde and Quan to Plaintiff's Third Amended Complaint was sustained by the Los Angeles County Superior Court, Department 83, the Honorable Judge Warren H. Deering presiding, on December 31, 1986. (CTR 982-983). The Court sustained the general Demurrer to the First Cause of Action for conversion, "and to the extent that it is incorporated in all of the remaining causes of action," sustained the Demurrers to the remaining twelve causes of actions set forth in the Complaint.

Among the grounds offered by the Court in its Minute Order were Plaintiff's supposed failure to allege that he did not consent to "medical or scientific study," or that the Defendants knew Plaintiff's blood cells had commercial value and intended to commercially exploit them prior to their withdrawal from Plaintiff. The Court also referred to Plaintiff's supposed failure to allege whether he consented to his splenectomy for therapeutic purposes, or that the splenectomy was totally unrelated to therapeutic purposes. (CTR 982-983).

The Court also mentioned that no copy of Exhibit "A" was attached to the Third Amended Complaint. This point appears to have been made moot by the fact that Exhibit "A" had been misplaced or lost by the clerk and was therefore unavailable for the Court's review, despite

the fact that it had been duly filed with the Court along with the Third Amended Complaint (CTR 758-759).

The Court granted Plaintiff thirty days leave to amend after notice by Defendants. (CTR 983). Plaintiff subsequently filed a Motion for Clarification or, in the alternative, for reconsideration of ruling on Defendants' Demurrer to Plaintiff's Third Amended Complaint (CTR 987-1001). The Court clarified its ruling by indicating that since the Demurrer to the First Cause of Action was sustained on certain grounds, and the First Cause of Action "was incorporated into the remaining causes of action," those remaining twelve causes of action "were defective for the same reasons." (CTR 1034-1035). Plaintiff subsequently filed his notice of election not to amend Plaintiff's Third Amended Complaint (CTR 1043-1052) along with a letter to the Court explaining Plaintiff's decision to seek an appellate determination of the issues raised by the Court's ruling on the Defendants' Demurrer.

On March 19, 1986, Judge Deering issued an Order Dismissing Action Against Defendants the Regents, Golde and Quan only. (CTR 1050-1052). On May 15, 1986, Plaintiff filed and served a timely notice of appeal of the Order of Dismissal and Judgment thereon for Defendants the Regents, Golde and Quan only. (CTR 1056-1058).

2. Order of Dismissal and Entry of Judgment Thereon Of Plaintiff's Action Against Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation.

Defendants Genetics Institute, Inc., and Sandoz Pharmaceuticals Corporation each subsequently filed separate

demurrers to the same Third Amended Complaint. The Los Angeles County Superior Court, Department 88, the Honorable Judge John L. Cole presiding, sustained the demurrers without leave to amended.

In its Minute Order (CTGS 801-804), the Court agreed with Judge Deering's ruling regarding Plaintiff's supposed failure to allege no medical purpose for the splenectomy operation. The Court further indicated that because there already was an appeal pending that may resolve "the central issues," the Court did not grant leave to amend. (CTGS 801-802).

The Order of Dismissal of Plaintiff's actions against Defendants Genetics Institute, Inc. and Sandoz Pharmaceuticals Corporation was signed by Judge Cole and entered and filed on July 2, 1986. (CTGS 804). On August 28, 1986, Plaintiff filed and served a timely Notice of Appeal of the Order of Dismissal. (CTGS 805-834).

3. Consolidation of These Appeals.

On November 10, 1986, Plaintiff filed a Motion to Consolidate Plaintiff's Appeals of Separate Orders of Dismissal and Judgments Entered Thereon with this Court of Appeal, arguing that the same questions of law were central to both Appeals, and the court, in issuing the second Order of Dismissal, expressly adopted positions taken by the court in issuing the first Order of Dismissal. On December 5, 1986, the Court of Appeal, Presiding Justice Arleigh Woods, ordered the Appeals filed on May 15, 1986 and August 28, 1986 consolidated.

B. STATEMENT OF FACTS AS ALLEGED IN PLAINTIFF'S THIRD AMENDED COMPLAINT.

1. Plaintiff's Blood Cells Have Unique and Commercially Valuable Properties.

Plaintiff John Moore has unique white blood cells (lymphocytes) which produce unique and plentiful immune system regulators (lymphokines) which are important in the human body's defense mechanisms against blood diseases, cancers, immune system deficiencies (such as AIDS), various cancers, and other diseases. (CTR 707:25-28, 708:1-5). As a result, samples of Plaintiff's blood cells, when cultured and grown in the laboratory, are of great value and importance in the commercial development of therapeutic biological products useful in the treatment of such conditions, as well as in the prevention of anemias and other blood disorders. Specifically, Plaintiff's unique cells produce lymphokines and blood factors which play important roles in the development and proliferation of specialized blood cells, and do so in scientifically, therapeutically, and commercially useful fashion and quantities so as to facilitate large scale production of those lymphokines for medical and commercial use. (CTR 708:6-13; 722:27-28, 723:1-22; 737:4-27, 738:1-8).

In describing Plaintiff's cells, Plaintiff's former physician, Defendant Golde, has stated in writing that "to our knowledge, this is the only human cell-line that produces these factors and, because it is an immortalized cell line, the factors can be produced in large quantities." (CTR 724:2-15). However, Plaintiff was not informed and

was kept unaware of the unique properties and commercial value of his blood cells by Defendant Golde and the other Defendants at least until within one year of the filing of this lawsuit. (CTR 736:20-28, 737:1-3).

2. Plaintiff Entered Into a Physician-Patient Relationship With Defendants The Regents, Golde, and Quan Which Continued For a Seven Year Period From 1976 to 1983.

In 1976, Plaintiff was diagnosed as having a rare blood disorder known as "hairy-cell leukemia." (CTR 710:24-26). Plaintiff sought an additional opinion and consulted Defendant David W. Golde, M.D. at UCLA Medical Center in October, 1976. (CTR 710:27-28, 711:1-3). Defendant The Regents owned and operated UCLA Medical Center, holding themselves out to provide care and treatment for patients (CTR 708:20-24), and Defendant Golde is a medical doctor, licensed to practice in the State of California (CTR 708:26-27) who possesses expertise in blood and blood components (CTR 711:4-14).

These Defendants examined Plaintiff and confirmed the diagnosis of Plaintiff's condition, claiming that it required further medical care which they would provide. (CTR 711:20-28). Defendants Golde and The Regents also indicated to Plaintiff that, as part of their care, they would surgically remove his spleen. (CTR 712:1-5). On October 20, 1976, certain UCLA surgeons (not Defendant Golde) performed this splenectomy, to which Plaintiff consented based solely upon the Defendants' representations that the procedure was necessary for his care and treatment. (CTR 714:19-28, 715:1).

Thus began a physician-patient relationship between Plaintiff and Defendants The Regents, Golde and Quan which continued uninterrupted over a seven year period from 1976 through September 20, 1983, or later. (CTR 717:16-28, 7:18:1). At the direction of the Defendants, and in reliance on their representations to him that such visits and tests were necessary for his health and well-being, Plaintiff returned periodically to the facilities of Defendants Golde and The Regents on approximately one dozen occasions at roughly six-month intervals throughout the seven year physician-patient relationship. Each of these visits was for the purpose of enabling the Defendants to withdraw from Plaintiff large quantities of his blood and tissues. (CTR 718:2-9).

3. The Defendants Acquired and Maintained Access To Specimens of Plaintiff's Unique Blood Cells Throughout the Seven Year Period by Virtue of Their Physician-Patient Relationship With Plaintiff.

The Defendants represented to Plaintiff that the periodic withdrawals of his blood and tissue were necessary for his health, and that they were to be performed only by the Defendants and at their direction exclusively at their facilities at UCLA Medical Center. (CTR 718:6-18). These removals began two weeks prior to the splenectomy (CTR 711:20-23), and included the subsequent operation and the approximately one dozen periodic visits which followed throughout the seven year period of the physician-patient relationship. (CTR 717:16-28).

4. The Defendants Discovered the Unique and Commercially Valuable Characteristics of Plaintiff's Blood Cells and Grew Them In the Laboratory For Their Own Use.

Because of their expertise and familiarity with blood and blood components, the Defendants were aware, prior to their contact with Plaintiff, that blood products and components with certain qualities would be of great value in commercial and scientific efforts to develop profitable therapeutic products. (CTR 711:4-9). In addition, the Defendants also knew that access to a patient with blood cells possessing unique properties would provide them with a steady and natural source of valuable blood and blood components, and would provide them with competitive, commercial and scientific advantages. (CTR 711:10-19).

Prior to Plaintiff's splenectomy, Defendants Golde, Quan and others, without advising Plaintiff or obtaining his consent, made arrangements to obtain portions of his spleen tissue following its surgical removal in connection with their desire to have access to Plaintiff's blood cells. (CTR 712:6-13). In fact, prior to the operation, Defendant Golde provided written instructions to the medical and research staff of Defendant The Regents, instructing them to study and characterize Plaintiff's blood cells for research purposes independent of Plaintiff's care (CTR 713:9-28, 714:1). This was done without informing the Plaintiff or obtaining his consent.

Following the operation, Defendants Golde and Quan removed from the pathology department portions of Plaintiff's spleen, and took them to a separate research facility of Defendant The Regents, where Plaintiff's blood

cells were studied and grown. The cells were studied and stored by the Defendants in order to further research and commercial activities of the Defendants which were unrelated to Plaintiff's health care. (CTR 715:2-16).

As their physician-patient relationship with Plaintiff continued, and as they observed the characteristics of the cell-lines grown from Plaintiff's cells, the Defendants recognized the cells' unique ability to produce important lymphokines in a commercially useful fashion. (CTR 722:27-28, 723:1-7). Therefore, the defendants recognized that the unique properties of Plaintiff's cells would not only enable them to obtain useful quantities of those lymphokines, but also to facilitate the identification and cloning of the genetic sequence possessed by Plaintiff's cells which was responsible for their lymphokine production. (CTR 723:7-13).

In August, 1979, Defendant Golde submitted to officials of Defendant The Regents a "Report of Possibly Patentable Device, Process, Product or Plant" describing Plaintiff's cells, in which he states that the "cell line is unique because it produces a series of T-cell products referred to lymphokines", and that "many of these factors may have considerable value as reagents and ultimately as therapeutic products." The report goes on to state that "to our knowledge, this is the only human cell line that produces these factors and, because it is an immortalized cell line, the factors can be produced in large quantities." (CTR 724:2-15).

5. The Defendants Did Not Inform Plaintiff Of The Unique and Valuable Properties Of His Cells.

At no time did the Defendants inform Plaintiff of the unique and valuable characteristics of his cells, nor of

their value in scientific and commercial activities, either before, at the time of, nor for over seven years after Plaintiff'[sic]splenectomy. (CTR 712:14-27). At no time did the Defendants inform Plaintiff of their intentions or activities in studying Plaintiff's cells, or in establishing cultures of his cell-line (named the "Mo-cell line" after Plaintiff's last name), nor did they request or receive any consent or permission from Plaintiff to conduct these research or commercial activities on his blood cells and tissue samples. (CTR 713:9-21).

In fact, the Defendants did not inform Plaintiff of the unique and valuable characteristics of his cells, nor of any of their medical articles, grant applications, patent applications, research agreements, or commercial contracts or income concerning his cells at any time throughout the entire course of the seven years in which Plaintiff was regularly seen by Defendants as their medical patient. (CTR 718:19-28, 719:1; 720:20-28; 721:1-16; 731:21-28, 732:1-2; 733:19-28). Whenever Plaintiff inquired as to any possible or potential value or interest his blood samples taken by the Defendants may have, or when he made inquiry concerning the nature of any research which may be performed upon those samples, the Defendants affirmatively represented to Plaintiff that there was no commercial or financial value to his blood cells, and that any research that they were performing was strictly academic and purely scientific medical research solely in connection with their efforts to determine the causes of his blood disorder (CTR 719:18-28, 720:1-19).

6. Defendants Golde, Quan and The Regents Applied For and Had Issued To Them A U.S. Patent On Plaintiff's Cells, But Did Not Inform the Plaintiff.

On or about May, 1979, Defendants Golde and The Regents initiated the University procedures by which an application for a patent on the Mo cell-line derived from Plaintiff could be prepared (CTR 723:23-28, 724:1-15). Pursuant to these efforts, Defendants Golde and others composed an abstract of invention entitled "Invention: A Unique T-Lymphocyte Line and Products Derived Therefrom, UC File: 118-79 (Golde)" which stated that Plaintiff's cells "provide either directly or indirectly, a source of the genes for the proteins of interest, which by conventional genetic engineering techniques, can be introduced into microorganisms for continuous large-scale production of the proteins." (CTR 724:16-28, 725:1).

On January 30, 1981, Defendants Golde and Quan were listed as "inventors" on a patent application filed by Defendant The Regents on the Mo cell-line extracted from the Plaintiff. By virtue of an established policy of Defendant The Regents, Defendants The Regents, Golde and Quan share in any royalties or profits resulting from licensing or contracts stemming from the patent. (CTR 726:13-21).

After filing a second application for the same patent and abandoning the first on January 6, 1983 (CTR 729:5-12), the patent was issued on March 20, 1984. The patent, entitled "Unique T-Lymphocyte Line and Products Derived Therefrom," commonly designated as the "Mo-Cell Line", bears United States Patent No. 4,438,032. The subject of the patent issued to the Defendants covers

all of the products produced by the Mo-Cell Line known to the Defendants. (CTR 735:10-28, 736:1-19; 737:4-27, 738:1-15).

Despite the fact that the five or more years involved in the patent application process took place entirely within the seven year period of Plaintiff's physician-patient relationship with Defendants Golde, Quan, and The Regents, none of those Defendants, nor any of the other named Defendants, ever informed Plaintiff that they were seeking to obtain a patent or to commercially utilize and exploit his cells for their economic benefit. As a result, Plaintiff had no basis to know of those facts until after the patent was issued, and was not provided with an opportunity to participate in or challenge those economic benefits (CTR 736:20-28, 737:1-3).

7. Defendants Golde and The Regents Negotiated And Entered Into Lucrative Contracts With the Biotechnology Firm Defendant Genetics Institute for the Commercial Development of Plaintiff's Cells, But None of the Defendants Ever Informed Plaintiff or Gave Him the Opportunity to Participate.

During the period of the ongoing physician-patient relationship and Plaintiff's periodic visits to their facilities, Defendants Golde and The Regents initiated extensive negotiations with a variety of biotechnology firms, including Defendant Genetics Institute (CTR 726:26-28, 727:1-17) by which the Defendants sought to promote the commercial development, testing, and marketing of Plaintiff's cells without his consent or knowledge.

In May, 1981, Defendants Golde, The Regents and Genetics Institute entered into a "Collaborative Research Agreement" which had as its stated primary purpose the commercial development and exploitation of Plaintiff's cells. The agreement provided for payment by Genetics Institute to Defendants Golde and The Regents of at least $330,000.00 over a three year period, in exchange for which Defendant Genetics Institute received exclusive access to Plaintiff's cells and the research being performed on them. (CTR 728:1-13). At the same time, Defendant Golde entered into a separate and distinct private agreement with Defendant Genetics Institute by which he became a paid consultant of the firm and acquired vesting rights to 75,000 shares of stock in the company for one cent per share. (CTR 727:18-28).

Throughout the entire period of time described by Plaintiff's complaint, and thereafter, neither Defendants Golde, Quan, The Regents, nor Genetics Institute ever informed Plaintiff of these commercial arrangements involving his cells or the financial interest of the various parties in the exploitation of his cells. (CTR 733:19-28).

8. The Defendants Added A Multinational Pharmaceutical Firm, Defendant Sandoz, To These Agreements To Further Their Plans To Commercially Develop and Market Products Based Upon Plaintiff's Cells, But None of The Defendants Ever Informed Plaintiff Or Gave Him the Opportunity To Participate.

In early 1982, again during the ongoing physician-patient relationship with the Plaintiff, Defendants Golde, The Regents, and Genetics Institute sought additional

funding and support from a major pharmaceutical firm to assist them in their efforts to develop and market commercial products from Plaintiff's cells. (CTR 728:14-20). Following extensive negotiations involving Defendant Golde, the Defendants entered into an agreement with the major multinational pharmaceutical firm Defendant Sandoz Ltd., parent corporation and owner of Defendant Sandoz Pharmaceuticals Corporation. By the terms of that agreement, the prior collaborative agreement was extended one year, and an additional $110,000.00 was to be paid to Defendants The Regents and Golde, enabling Defendant Sandoz to also enjoy exclusive access to Plaintiff's cells. (CTR 728:21-28, 729:1-4). The involvement of Defendant Sandoz was to be the clinical testing and marketing of products derived from Plaintiff's cells by the Defendants pursuant to their commercial agreements. Once again, Plaintiff was never informed by the Defendants of any of these facts or arrangements.

9. Defendants Genetics Institute and Sandoz Knew Or Should Have Known That The Unique Cells Which Were The Subject Of Their Commercial Agreements Came From Plaintiff Alone, And Were Obtained By Their Co-Defendants Golde and The Regents By Virtue Of Their Physician-Patient Relationship With Plaintiff.

Because of the medical journal articles, grant applications and presentations made by Defendants Golde and The Regents to the commercial Defendants regarding the unique characteristics of Plaintiff's cells and describing the source of those cells (CTR 722:4-18), and the various descriptions of Plaintiff as the source of those cells found

in the patent applications made by Defendants The Regents, Golde and Quan (CTR 724:16-23; 344: Col. 2, 45-50), Defendants Genetics Institute and Sandoz were aware that Plaintiff was a patient of Defendant Golde and was the source of the cells which were the subject of their commercial collaboration. Furthermore, because Defendants Genetics Institute and Sandoz employed Defendant Golde as a consultant at least in part because of his role as Plaintiff's physician (CTR 710:1-23), these Defendants were equally aware that their exclusive access to Plaintiff's cells and by-products was made possible by virtue of Defendants Golde and The Regents' physician-patient relationship with Plaintiff.

Defendant Golde was, in addition to being an employee and agent of Defendant The Regents, was also an employee, advisor, consultant and agent of Defendants Genetics Institute and Sandoz. Through their actions and compensation of Golde, and their acceptance of the benefits of access to Plaintiff's cells, these Defendants ratified or approved Defendants [sic] Golde's prior and present activities with regard to Plaintiff's cells. (CTR 710:6-23; 721-731).

The Defendants have applied for or have had issued to them various valuable patents based upon Plaintiff's cells (CTR 735-738), and have engaged in commercial development, testing, and marketing activities to which Plaintiff's cells were absolutely essential. (CTR 739:26-28, 740:1-20). Each of the Defendants will continue to benefit competitively and financially from their exploitation of Plaintiff's cells obtained in the context of the physician-patient relationship (CTR 741:2-17).

10. None Of The Defendants Ever Obtained Plaintiff's Informed Consent To Their Commercial Research Activities Utilizing His Unique Blood Cells.

Because the Defendants misrepresented and actively concealed from Plaintiff the value of his unique cells and their commercial activities and patents based upon the cells, Plaintiff could not possibly have given any form of implied or express informed consent to those activities.

Had the Plaintiff known of the activities of the Defendants in commercially exploiting his cell line, and of their financial interest therein, he would not have consented to or authorized their removal from his body, and would have either insisted upon participation in these activities, or, sought medical care elsewhere. (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

11. The Defendants Have Gained Significant Financial and Competitive Advantages In The Biotechnology Field By Their Exploitation Of Plaintiff's Cells Without His Knowledge Or Consent.

Defendants' activities in developing Plaintiff's cells were designed solely to benefit themselves financially and competitively, rather than to freely share the cells' characteristics for the benefit all of [sic] mankind.

Because of the unique properties of Plaintiff's cells, and the fact that Plaintiff was the only known source of those cells, access to Plaintiff's cells has provided the Defendants with significant financial and competitive

advantages in the highly competitive biotechnology market for therapeutic products derived from Plaintiff's cells. (CTR 721-731:1-13; 740:5-20). In fact, by virtue of the patent issued to the Defendants on Plaintiff's cells, Defendants Golde, Quan, and The Regents and their co-defendant collaborators now enjoy a commercial monopoly over those products of Plaintiff's cells (CTR 736:13-28), and the additional patent applications on Plaintiff's cells and their by-products provide the Defendants with even further financial and competitive advantages (CTR 730:7-28).

While the true commercial potential of the lymphokine products produced or made possible by Plaintiff's cells are difficult to estimate, published reports in a biotechnology industry periodical predict a potential market of approximately $3.01 billion by the year 1990 for the whole range of one type of immune system regulation, which includes the Granulocyte Macrophage-Colony Stimulating Factor (GM-CSF) which was derived by the Defendants exclusively from Plaintiff's cells. (CTR 731:1-13).

12. Plaintiff's Property Interests Have Been Damage By The Defendants Due To Their Conversion and Breach Of Duty, And Plaintiff Has Been Precluded From Receiving His Contributive Share Of The Profits Generated By The Commercial Exploitation Of His Unique Cells.

Plaintiff alleges that he has a recognizable property interest in his valuable cells and their by-products, and because he was not informed of the truth regarding the

value of his contribution to the Defendants' commercial activities, he did not provide a free and voluntary consent to their commercial use. (CTR 738:16-20). Had the Plaintiff known the true facts regarding Defendants' activities, he would have insisted upon participation in the decisions regarding the control and use of his cells, and would have sought and obtained compensation for the full value of his contribution to the Defendants' efforts to patent and commercially develop for their own profit the products of Plaintiff's cells. (CTR 738:20-26).

Because Plaintiff was kept unaware of the Defendants'commercial and financial activities in this regard, Plaintiff was unable to participate in the decision-making process concerning the utilization and dissemination of his cell line, or to seek or enter into any other economic or commercial relationship with other research institutions or commercial firms, by which he could have profited from the unique properties available from his own blood cells. Furthermore, the competitive advantage Defendants obtained by concealing their activities from Plaintiff for seven years or more, and by patenting his cell line during that period without his knowledge, at once extends their monopoly over his cells, and has the effect of further discouraging the interest of competitive parties in the biotechnology field. (CTR 730:7-28; 752:12-18). As a result, Plaintiff has suffered the loss, not only of his property interest in the living cells of his own body, but also his fair share of the profits generated by the concealed commercial activities of the Defendants to which his cells were essential. (CTR 740:21-28, 741, 742:1-7).

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

The judgments of the Superior Courts dismissing Plaintiff's causes of action must be reversed. Prior wrongful intent, one of the grounds mentioned by the Superior Court in sustaining the Demurrers, is not a necessary element to be alleged to state a cause of action for conversion. The Courts' emphasis on whether Plaintiff had somehow "consented" to "medical or scientific study" overlooks the critical point that Plaintiff was never informed of the Defendants' commercial and patent activities exploiting his cells, and therefore those activities clearly exceeded any authorized use for medical treatment purposes to which Plaintiff can be presumed to have agreed.

The trial courts were also in error in finding that any deficiencies in the cause of action for conversion were somehow fatal to the entirely separate and independant remaining twelve causes of action, merely because they incorporated by reference the same general recitation of factual allegations.

Although the Superior Courts analyze only the First Cause of Action for conversion, Plaintiff will present herein argument concerning the causes of action for lack of informed consent, breach of fiduciary duty, and fraud and deceit, as they are of equal if not greater importance in this case. The long-standing common law recognition of the physician-patient relationship as imposing upon the physician the fiduciary duty of full disclosure to the patient provides the foundation for the allegations of wrongdoing in the Complaint. As the Court of Appeal

held in *Rains v. Superior Court* (150 Cal.App.3d 933 [1984]), the fiduciary nature of the physician-patient relationship dictates that the failure to fully disclose the physician's non-therapeutic purposes for a therapeutic contact with the patient vitiates that patient's consent to that medical treatment.

Furthermore, Defendants' failure to disclose their hidden commercial activities and financial interests in exploiting Plaintiff's valuable cells obtained through the physician-patient relationship constituted a breach of fiduciary duty, resulting in constructive fraud and a constructive trust. A physician-fiduciary in whom confidence is reposed is presumed to have committed fraud or exercised undue influence when the fiduciary actively participates in obtaining an economic advantage over the patient-beneficiary, as the Defendants did in this case. Furthermore, the conduct of the Defendants also amounts to actual and constructive fraud.

Plaintiff's Complaint also sets forth sufficient allegations to support causes of action for unjust enrichment, quasi-contract, bad faith, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title and accounting. These causes of action, for the most part, arise from the same legal and factual basis supporting the first four causes of action, and, it should be noted, were also not considered by the Superior Courts in sustaining the Demurrers.

While the proper application of well-recognized theories of liability is appropriate in this case despite the

admittedly novel facts alleged, it is important to remember that the law of torts is not an immutable body of rigid classifications. Therefore, the common law tradition of tort doctrine evolving with the realities of society would be maintained should the Court prefer to fashion a new remedy to prevent the breach of duties and deceptions alleged in the Complaint from being rewarded with commercial profit.

B. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR CONVERSION.

1. Definition of the Tort of Conversion.

In 1960, the California Supreme Court defined conversion as "an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession. (*De Vries v. Brumback*, 53 Cal. 2d 643, 647, [1960]). Conversion has also been defined as "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Pope v. National Aero Finance Co.*, 236 Cal.App.2d 722, 731, [1965], quoting *Gruber v. Pacific States Savings and Loan Co.*, 13 Cal. 2d 144, 148 [1939]).

More recently, the U.S. Court of Appeals for the Fourth Circuit has held that "conversion involves an act of control or dominion over the property that seriously interferes with the owner's rights." (*United States v. Stockton*, 788 F.2d 210, 216 [4th Circuit 1986]). The Court of Appeals emphasized that the interference with the

owner's rights can be considered tortious conversion "regardless of the manner in which the defendant obtains possession of the property" and that "a conversion can occur . . . *following the lawful entrustment of the property to the defendant.*" (emphasis added) (*Id.*, at 216, fn.5).

The key factor in the court's analysis is that the acts of dominion or appropriation must be without authorization from the owner of the property: "The notion that the act of dominion or appropriation is contrary to the wishes of the owner, or at least *without clear permission from the owner,* is inherent in the concept of conversion." (emphasis added) (*Id.*).

2. Necessary Elements of a Cause of Action for Conversion.

a. Ownership or Right to Possession of Tangible Property.

To support an action for conversion, it is not necessary that the plaintiff alleging conversion be the "owner" of the property involved. In *Igauye v. Howard,* 114 Cal.App.2d 122, (1952), the Court of Appeal held that "It is sufficient if he (the plaintiff alleging conversion) had actual possession at the time of the alleged acts." Furthermore, even actual possession is not required; it has been held that an action "may be maintained by a person who, although not in possession, had a *special interest* in the property giving him a right to possession at the time of the conversion." (emphasis added) (*Pope v. National Aero Finance Co.*, 236 Cal.App.2d 722, 731, [1965]).

b. Plaintiff Specifically Alleges Ownership and/or the Right to Possession of His Blood and Bodily Substances.

Plaintiff alleges that his blood and bodily substances are his tangible personal property (CTR 738:27-28, 739:1-5), and that he is the owner of his blood and bodily substances and of their by-products (CTR: 738:16-17).

Further allegations of Plaintiff's ownership and/or possession of his blood and bodily substances arise by plain inference from the facts set forth in the complaint including allegations that Plaintiff's blood and bodily substances and cell line were removed from his body, and therefore from his actual possession (CTR 714:23-28, 715:1; 717:16-28, 718:1-9; 736:2-4).

c. Plaintiff's Blood and Bodily Substances, as Described in the Complaint, are a Species of Tangible Personal Property Capable of Being Converted.

Proper allegation of the tort of conversion requires that the party alleging conversion must have some form of *property interest* in the subject property.

As set forth in the California Civil Code "property" can be either "real" (Civil Code §§ 657, 658) or "personal" (defined by Civil Code § 663 as anything that is not real property). Property classified as "personal" can be either "corporeal" or "incorporeal". Incorporeal personal property can be properly viewed as a legal right in legally recognized intangibles, such as rights which define "relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions

enforceable in the courts." (63 Am. Jr. 2d *Property* § 11 [1984]). Thus, the legal concept of "property" refers not to "a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition." (*Id.*).

Careful analysis of the property interests legally recognized in modern jurisprudence clearly supports the view of Plaintiff's blood and bodily substances as a species of personal property subject to conversion. As one commentator has recently observed:

> "In addition to statutory and judicial views of the human body as property, human tissue possesses characteristics that satisfy many of the criteria for establishing rights in tangible property. The human body is material in nature. (62 A Am.Jur.2d *Property* § 11 [1984]) An individual can control, exercise dominion over, and dispose of his or her body. (*Id.* at § 1) . . .
>
> Additionally, human tissue has many of the expectations that European civil law requires under the definition of property . . . "

(Comment, *Toward The Right Of Commerciality; Recognizing Property Rights In The Commercial Value Of Human Tissue*, 34 UCLA L.Rev. 208, at 218 [1987]).

i. Conversion Does Not Require Proof of Prior "Wrongful" Intent.

In sustaining the demurrer of Defendants The Regents, Golde and Quan, Judge Deering ruled that Plaintiff had not properly alleged a cause of action for conversion because Plaintiff had not alleged that the

Defendants actually knew the commercial value of Plaintiff's blood and bodily substances prior to their withdrawal, and that the Defendants actually intended to commercially exploit that value prior to that withdrawal (CTR 982-983).

Similarly, in sustaining without leave to amend the subsequent demurrers of Defendants Genetics Institute and Sandoz Pharmaceuticals Corp., the court stated that it shared Judge Deering's belief that it is "important for the Complaint to have alleged, if it be the fact, that there was no medical purpose for the removal of the spleen or the other procedures undertaken by the hospital Defendants." (CTGS 802). While this ruling is analyzed further *infra* in the discussion of exceeding authorized use as constituting conversion, it is also an apparent reference to a failure to allege Defendants' wrongful intent.

This "requirement" that Plaintiff allege a wrongful intent to state a claim for conversion is not supported by the definition set forth in the Restatement, nor by California and federal case law. Comment (b) to § 223 of the Restatement (2d) of Torts (1965) concerning the "intent" requirement states:

> "If the actor has the intent to do the act exercising dominion or control, however, *he is not relieved from liability by his mistaken belief that he has possession of the chattel or the right to possession, or that he is privileged to act.*" (emphasis added)

Restatement (2d) of Torts (1965), § 223, Comment (b), pages 436-437.

Specific recognition that a *wrongful* intent is irrelevant to a claim for conversion was first made by the

California Supreme Court in *Poggi v. Scott*, 167 Cal 372 (1914). The defendant in *Poggi* had bought a building where plaintiff's wine barrels had been stored in the cellar, and defendant, thinking that the barrels were empty and worthless except for their salvage value, sold them to a third party. Defendant had argued that because he had no way of knowing that the barrels contained plaintiff's wine, nor their true value, he could not be held liable for conversion. In rejecting defendant's argument that wrongful intent must be shown on the part of the converter, the California Supreme Court clarified the basis of the cause of action for conversion:

> "The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. . . . Therefore, *neither good nor bad faith, neither care nor negligence, neither knowledge, nor ignorance, are of the gist of the action.* (emphasis added).

(*Id.* at 375)

The Supreme Court went further in discounting the relevance of the defendant's motives, or even the degree of his negligence, in committing the conversion. The Court stated:

> "The plaintiff's right of redress no longer depends on his showing in any way that the defendant did the act in question from wrongful motives, or generally speaking, even intentionally; and hence the want of such motives, or of intentions, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have

> caused damage) is unlawful and redressable as a tort."

(*Id.* at 375, citing 1 Bigelow on Torts at 6)

Poggi v. Scott was reaffirmed by the California Supreme Court almost two decades later in *Edwards v. Jenkins*, 214 Cal 713 (1932). More recently, *Poggi v. Scott* has been cited with approval by the U.S. Court of Appeals for the Fourth Circuit. In *United States v. Stockton*, 788 F.2d 210 (4th Circuit 1986), a local union official embezzled funds and was sued for conversion. In clarifying the mental state necessary to be shown for conversion, the Court of Appeal, citing the U.S. Supreme Court in *Morissette v. United States*, 342 U.S. 246, 270 (1952), stated:

> "The mental state required for conversion is purely and simply a specific intent to appropriate the property. Knowledge that the property belongs to another, or that the appropriation is unauthorized by the owner, is not necessary."

(788 F.2d 210, 216).

In a footnote which cites the California Supreme Court's *Poggi* decision, the federal Court of Appeals made it clear that an action for conversion would lie even when the Defendant believed the property in question had been *abandoned* by its owner:

> "Civil liability requires a specific intent to appropriate the property. A defendant may be civily liable, however, even if he believed the property to be abandoned, *Poggi v. Scott*, 167 Cal. 372, 139, P.815 (1914), or purchased the property in good faith from a thief . . . "

(788 F.2d 210, 216 n.7).

This well-settled rule that the tort of conversion does not require a "wrongful intent" or "motive", nor even a "negligent act," has led some California Courts of Appeal to characterize the cause of action as one involving strict liability. (*Beverly Finance Company v. American Casualty Company of Reading, Penn.*, 273 Cal.App.2d 259, [1969]; *Krusi v. Bear, Stearns and Company*, 144 Cal.App.3d 664, [1983].)

Thus, plaintiff's clear allegations that the defendants intended the acts which made possible the conversion of plaintiff's blood and bodily substances for their own commercial purposes is all that the law of California requires for the "intent" aspect of conversion.

ii. The Defendants Exercised Dominion Over Plaintiff's Blood and Bodily Substances in Derogation of His Rights Therein and Excluded Him from Control.

In addition to exercising dominion and control over Plaintiff's valuable cell lines and their products, the Defendants utilized Plaintiff's unique cells for their own benefit and commercial profit in a manner which excluded Plaintiff from any participation in or control of those items and the activities based upon them. The Defendants accomplished these uses excluding Plaintiff, not only through their research and development of commercial products based on the Mo-cell line, but also through the issuance to them of patents, licensing and royalty agreements, and commercial contracts which limited exclusive access to those materials to the Defendants, as well as their carefully controlled distribution of information on and specimens of Plaintiff's cells (CTR

735:10-28, 736:2-28; 728:1-13; and 722:19-26). In fact, Plaintiff is in the ironic position of risking legal prosecution for patent infringement should he attempt to independently develop and market the valuable therapeutic products of his own cells.

d. Defendants' use of Plaintiff's Blood and Bodily Substances Clearly Exceeded Whatever Limited Authorization Was Given by Plaintiff.

The Minute Orders of the separate rulings by the Superior Court sustaining the various Demurrers also raise the question of consent or authorization by Plaintiff to the uses to which Defendants put his removed blood and bodily substances. One ground set forth by Judge Deering was Plaintiff's supposed failure to allege that he was unaware that tissue removed during his care by the Defendants might be used for medical or scientific study, as well as for diagnosis and treatment (CTR: 982). The same court further found the complaint defective in that it purportedly did not allege whether Plaintiff had consented to the removal of tissues for therapeutic purposes, or that the removal of Plaintiff's tissues was totally unrelated to therapeutic purposes. (CTR 983).

Similarly, Judge Cole's ruling sustaining the demurrers of separate defendants, in referring to and agreeing with the earlier ruling, stated that the court concurred in the belief that it was "important for the complaint to have alleged, if it be the fact, that there was no other medical purpose for the removal of the spleen or the other procedures undertaken by the hospital defendants." (CTGS 802).

The Superior Court rulings imply that once any type or level of consent is given, all subsequent activities involving the removed living cells are authorized and conversion cannot occur. However, even in a situation in which the owner or possessor of property consents to the removal of that property for a specific purpose, conversion still occurs when the recipient of the property uses it in a manner which exceeds that authorized use, or uses it in a way which seriously interferes with the original owner or possessor's right to control that property.

Over a century ago, the California Supreme Court adopted the view that an unauthorized use by a person permitted to use the property constitutes a conversion. In *Hitchcock v. McElrath*, 72 Cal. 565 (1887), the plaintiff had loaned stock to the defendant for the special purpose of raising money to pay a promissory note. The defendant, however, did not use it for that purpose, but instead converted it to his own use. The Supreme Court affirmed the judgment for plaintiff against the defendant for conversion of the stock.

The California Supreme Court has also held that an authorization or consent obtained through false representations by the actor to the owner or possessor vitiates that authorization and results in a conversion of the property involved. In *Freedman v. Queen Insurance Co. of America*, 56 Cal.2d 454 (1961), the Court further held:

> "One who by fraudulent representations induces another to surrender the possession of a chattel to him has dispossessed the other of the chattel. Assent to the actor's taking possession of the chattel given under such circumstances is ineffectual to constitute a consent to the taking . . . "

(*Id.* at 457, quoting Restatement of Torts § 221, Comment [b], [d]).

Plaintiff's complaint alleges certain written and non-written forms of limited consent to the actual physical removal of his blood and bodily substances for medical purposes, but none of these constituted either an explicit or implicit authorization of or consent to commercial exploitation of his bodily substances. Nor were these in any way authorizations of the activities undertaken by the defendants including commercial development contracts, patents, cash payments, and other activities through which they exercised dominion and control over Plaintiff's bodily substances and excluded him from that control.

i. Defendants' use of Plaintiff's Blood and Bodily Substances Exceeded the Written Consents Given by Plaintiff To Their Removal.

It is clear that none of the three written consent forms involved in the seven year history of Plaintiff's treatment in this case can be held to constitute an express authorization of the patenting and commercial use and exploitation of Plaintiff's cells by the Defendants. The first form was silent as to such use and merely authorized surgeons to remove Plaintiff's spleen (CTR 714:2-18). The second form offered on April 11, 1983 was equally silent as to such commercial use, and, to the extent that it could possibly be interpreted to incorporate a waiver of undefined "rights" to products derived from those cells, such purported "authorization" is made clearly ineffective in

light of Plaintiff's lack of constructive or actual knowledge of Defendants' commercial activities due to Defendants' non-disclosures and misrepresentations (CTR 731:14-28; 732:1-18). The third consent form, offered to Plaintiff on September 20, 1983, not only suffered from the same defects and failures to disclose those commercial activities of the Defendants, but also included a specific written indication from the Plaintiff that he did not voluntarily grant to the Defendants his rights to any cell lines or products derived from the withdrawals obtained on that occasion (CTR 733:19-28, 734:1-10; 758-759).

ii. Defendants' Activities in Patenting and Commercially Exploiting Plaintiff's Unique Cells Clearly Exceeded Whatever Authorized use Can Be Inferred from Plaintiff's Acquiescence to Their Removal in Connection with His Health Care.

Plaintiff specifically alleges that there were numerous occasions on which Plaintiff's blood and bodily substances were removed in the context of his medical care when *no* written consent or authorization for their removal and use for specific purposes was presented to or signed by the Plaintiff. (CTR 717:16-28; 731:14-20). On those numerous occasions on which no written form or explicit authorization was presented to the Plaintiff, and even on those three occasions when they were, the issue arises as to whether and to what extent Plaintiff *impliedly* consented to the clandestine patenting and commercial exploitation of his unique cells by his treating physician and that physician's commercial collaborators.

Restatement (2d) of Torts, § 228, Comment (c) instructs that the scope of the authorization given, if any, is to be determined by the terms, either express or "reasonably to be implied", of the agreement between the parties, and sets forth a "reasonable man" test for determining whether a material breach of the permitted use has occurred.

In this case, the question becomes whether a reasonable patient under these circumstances would have had any basis for knowing that removed diagnostic samples of his blood or tissues would be used as the basis for patent applications and commercial exploitation by his physician and his commercial collaborators, whether his blood and tissues were unique and adaptable to such use, and whether that use was among the purposes for which such blood and tissues are customarily used by treating physicians.

Plaintiff was never told by the Defendants, and never had any reasonable basis to believe or suspect, the true value of his blood and bodily substances, or of Defendants' activities in developing, patenting, and commercially exploiting his unique cell line. (CTR 712:14-27; 713:15-21, 23-26; 714:6-18; 718:19-27; 721:1-16, 24-28; 722:1; 731:21-28, 732:1-2; 733:19-28; 735:10-19; 736:20-28, 737:1-3; and 738:16-20).

In fact, Plaintiff's complaint describes in detail 25 facts or events, known to the Defendants throughout this period, which would have been highly relevant to Plaintiff's decision to authorize the Defendants' removals of his blood and bodily substances. Those facts include the unique nature and value of his cell line, Defendants'

activities in patenting and entering into commercial contracts for the commercial exploitation of that cell line and its products, and the present and future commercial markets and monetary amounts involved. (CTR 722:4-28, 723-730, 731:1-13; 735:10-28, 736-738:1-8). Plaintiff further alleges that had he known of these activities and of the commercial exploitation of his cell lines by the Defendants, he would not have consented to or authorized their removal from his body, and would have either insisted on participation in these activities, or sought medical care elsewhere. (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

Thus, it is clear that the activities of the Defendants in patenting and commercially exploiting for their own financial gain the unique cells taken from Plaintiff exceeded whatever authorized use can be inferred or implied from Plaintiff's consent to their removal for his medical care.

e. Plaintiff has Properly Alleged Damages Stemming from Defendants' Conversion of His Blood and Bodily Substances.

Civil Code § 3336 sets forth the damages recoverable for the tort of conversion of personal property:

> The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> First – the value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of

prudence on his part would not have averted; and

Second – a fair compensation for the time and money properly expended in pursuit of the property.

The alternative language of the first part of CC § 3336, providing compensation for any loss "which is the natural, reasonable and proximate result" of the conversion, was recently interpreted by the Court of Appeal in *Krueger v. Bank of America*, 145 Cal.App.3d 204, (1983). (1983).

Interpreting C.C.§ 3336, the court held that the determination of damages under the alternative provision of the first section is applied "where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Id.*, at 215, quoting *Myers v. Stephens*, 223 Cal.App.2d 104, at 116 [1965]).

Plaintiff's complaint clearly sets forth special circumstances in this case which warrant the application of the alternative provision of Civil Code § 3336. In addition to the general damages allegations set forth in the complaint (CTR 740:21-28; 741, 742:1-7), Plaintiff has set forth sufficient factual allegations to demonstrate that a determination of damages based on the value of the tissue and blood at the time of the original takings would be manifestly unjust.

f. Plaintiff has Properly Alleged Facts Supporting a Claim for Punitive Damages.

The award of punitive damages has been upheld in actions for the tort of conversion. In *Cyrus v. Haveson* (654

Cal.App.3d 306, 135 Cal. Rptr. 246 [1976]), a case involving eviction and conversion of personal property, the Plaintiff sought punitive damages. The Court of Appeal held that causes of action for conversion and trespass, in addition to compensatory damages, also support the award of exemplary damages. (*Id.*, at 316, citing *Farraro v. Pacific Financial Corp.*, 8 Cal.App.3d 339, 351 [1970]; *Haun v. Hyman*, 223 Cal.App.2d 615, 619-20 [1963]).

C. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR LACK OF INFORMED CONSENT.

The well-recognized duties of disclosure imposed by the common law doctrine of informed consent are inherent in the physician-patient relationship. The complaint clearly alleges the existence of a physician-patient relationship between Plaintiff and Defendants Golde, Quan, and the Regents which continues over a seven-year period (CTR 717:16-28, 718:1).

Due to this physician-patient relationship, and because Defendants' withdrawals of Plaintiff's valuable blood and bodily substances for use in their commercial activities took place in the context of Plaintiff's medical care, each Defendant had a duty to disclose all relevant information to enable Plaintiff to make an informed decision regarding the removal and use of his blood and bodily substances.

Because Plaintiff was never told of these facts by the Defendants prior to his submission to blood and tissue withdrawals, Plaintiff never had any reasonable basis to believe or suspect the true value of his blood or bodily

substances, or of Defendants' activities and financial interests in developing, patenting, and commercially exploiting his unique cell line (CTR 712:14-27; 713:15-21, 23-26; 714:6-18; 718:19-27; 721:1-16, 24-28; 722:1; 731:21-28, 732:1-2; 733:19-28; 735:10-19; 736:20-28; 737:1-3; and 738:16-20).

The complaint describes in detail 25 facts or events, which were known to the Defendants but concealed from the Plaintiff throughout this period, which Plaintiff alleges would have been highly pertinent to Plaintiff's consent (CTR 722:4-28; 723, 730, 731:1-13; 735:10-28, 736-738:1-8). Had Plaintiff known of these activities and facts, he would not have consented to nor authorized their removal from his body, and would have either insisted upon participation in these activities, or sought medical care elsewhere (CTR 716:6-28, 717:1-15; 732:12-18; 734:11-17; and 738:20-26).

1. The Allegations of the Third Amended Complaint Set Forth a Cause of Action for Failure to Obtain Informed Consent Under Accepted Common Law Principles.

   a. The Common Law Doctrine of Informed Consent and the Fiduciary Duty of Full Disclosure.

In 1972, the California Supreme Court set forth four postulates which govern the rationale for the common law doctrine of informed consent in *Cobbs v. Grant*, 8 Cal. 3d 229 (1972):

> "The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parody. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to treatment, to be effective, must be an informed consent. And the fourth is that the patient, *being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arm-length transactions.*"

(emphasis added) (*Id.*, at 242).

The court found that emerging from these "axiomatic ingredients" is a "necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process." (*Id.*)

The physician's duty of full disclosure arises from the fiduciary nature of the physician-patient relationship. In *Bowman v. McPheeters*, 77 Cal.App.2d 795 (1947), the court held that the "relationship between the parties of physician and patient, which in contemplation of law is a fiduciary one," imposed upon the physician-defendants the fiduciary duty to "make a full and fair disclosure to plaintiff of all facts *which materially affected his rights and interests*." (emphasis added) (*Id.*, at 800). Where there is a duty to disclose due to the fiduciary nature of the relationship, the disclosure must be "full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured

thereby to an action." (*Id.* at 801, quoting *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal. 2d 226, at 235).

The fiduciary duty of full disclosure imposed upon a physician is not "governed by the standard practice of the physician's community", but rather has been held to be defined and imposed by the law of fiduciaries. As set forth by the Court of Appeal in *Berkey v. Anderson*, 1 Cal.App.3d 790 (1969) "to hold otherwise would permit the medical profession to determine its own responsibilities to the patients in a matter of considerable public interest." (*Id.*, at 805). Thus, the fiduciary duty of the physician is to make a full and fair disclosure to the patient of "all facts" which materially affect the patient's "rights and interests" (*Garlock v. Cole*, 199 Cal.App.2d 11, at 15 (1962), quoting *Bowman v. McPheeters*, cited *supra*, at 800).

As a result, the scope of the physician's fiduciary duty to disclose is measured not by the physician's estimation of a community standard of care, nor by what the physician thinks is necessary, but rather "by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decisions should be given." *Truman v. Thomas*, 27 Cal. 3d 285, at 291 (1980). Such "material information" is that "which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position" (*Id.* at 291). The extent of the disclosure duty is not determined solely by the physician's customary practice, but is "directly controlled by the unique situation of each patient," (*Brown v. Regents of University of California*, 151 Cal.App.3d 982 [1984]).

b. Due to the Fiduciary Nature of the Physician-Patient Relationship, the Scope of Disclosure is Not Limited To Physical Risks.

It is the patient who determines what factors are relevant to his or her decision to consent, and exactly which of his or her rights or interests are to be considered. Thus, "it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie." (*Cobbs v. Grant*, cited *supra*, at 242).

The prerequisite disclosure necessary before a truly informed consent can be obtained includes *all* information which, due to the trust inherent in the relationship and the superior knowledge of the physician, is known to the physician but not to the patient and is relevant to the patient's consent.

The courts have already recognized that the duty to disclose extends to all information affecting the patient's rights and interests, and not just information regarding physicial [sic] or medical risks.

In ruling that the statute of limitations had been tolled due to the physician's non-disclosure of the true nature and causes of plaintiff's injury, the Court of Appeal in *Bowman* (77 Cal.App.2d 795) looked to the fiduciary nature of the relationship as the basis for ruling that constructive notice did not apply. In so holding, the court stated that it was the duty of the physician defendants to make "a full and fair disclosure to plaintiff of all facts which materially affected his rights and interests", including information which would have enabled the

plaintiff to pursue his *legal rights* by suing the original physician for medical malpractice. (*Bowman*, at 800).

In 1982, the California Supreme Court affirmed this view that the doctrine of constructive notice is inapplicable in the physician-patient relationship because of its fiduciary nature and resultant obligations of full and fair disclosure. In *Brown v. Bleiberg*, 32 Cal.3d 426 (1982), the Supreme Court held that the duty to disclose may thus continue even *after* the physician-patient relationship has ended:

> "[T]he standard of diligence to be expected of a former patient cannot ignore the fiduciary relationship that existed between him and his doctor. During the continuation of the relationship, courts have given plaintiffs the benefit of an 'assumption' of continued reliance so that the tolling effect of nondisclosure or concealment will also continue absent unusual circumstances which should put the patient on notice thereof. Such reliance on the fiduciary role of the physician may naturally continue after the physician-patient relationship has terminated, though."

(*Id.*, at 438, n. 9).

c. Failure to Fully Disclose the Physician's Non-Therapeutic Activities or Purposes Vitiates a Patient's Consent to Medical Treatment.

In *Rains v. Superior Court* (150 Cal.App.3d 933 [1984]), an important case which is directly on point, the Court of Appeal held that even in those situations in which a patient agrees to a course of medical treatment, if the physician has not disclosed information material to the

patient's decision, that consent is not "informed" and is vitiated by the non-disclosure or concealment. This is true even where there may be some therapeutic purpose to the proposed treatment, but there are also non-therapeutic or personal purposes known to the physician but not revealed to the patient prior to consent.

The Court of Appeal found this doctrine wholly consistent with the postulates and policy considerations set forth in *Cobbs v. Grant*, cited *supra*. In *Rains*, the plaintiffs alleged in their second amended complaint that the defendant psychiatrists had induced them to enter into a residential group psychiatric treatment program involving certain acts of physicial [sic] violence, based upon false representations of the therapeutic value and limited term of the program.

The plaintiffs alleged that the defendants committed numerous batteries and assaults upon the plaintiffs during the course of the program, and admitted that the plaintiffs had consented to the use of physical violence as an aspect of the psychiatric treatment based upon the defendants' representations that such physical abuse was "necessary to plaintiff's becoming 'cured'." (*Id.*, at 936). However, the plaintiffs further alleged that the defendants actually used the psychiatric program as a pretext to employ psychological coercion. (*Id.*).

The defendants demurred to the plaintiffs' complaint on the ground that the plaintiffs' admission of their consent to the use of violence barred their cause of action for battery, and that such consent to an offensive touching is vitiated only in those instances where the touching is different in nature from that to which consent was given.

The defendants contended that under the holding of *Cobbs v. Grant*, since the alleged violent touchings were physically identical to the contact consented to by the plaintiffs, the plaintiffs' consent was not vitiated and a cause of action for battery could not lie. (*Id.*, at 937).

The superior court sustained defendants' demurrer without leave to amend, but later allowed the filing of a third amended complaint, after striking a battery count which contained new factual allegations that no information had been given to the plaintiffs concerning the real purpose of the violence, and that the violence was not for therapeutic purposes, but was employed to control the plaintiffs in a manner which was contrary to the representations made by the defendants. (*Id.*, at 938).

In an opinion granting plaintiffs' petition for writ of mandate, authored by Presiding Justice Woods, with Justices Kingsley and Amerian concurring, the court reviewed the authorities on vitiation of consent cited in *Fleming on Torts* (4th Ed. 1971, §78, at page 78), and *Prosser on Torts* (4th Ed. 1971, §18, at page 105), and concluded that those authorities supported by analogy "the correctness of the determination that a physician's intentional misrepresentation that an otherwise offensive touching is medically necessary vitiates the consent given in ignorance of the true non-therapeutic character of the touching." (*Rains v. Superior Court*, 150 Cal.App.3d at 940).

The court dismissed defendants' contention that holding that the non-disclosure of a non-therapeutic purpose vitiates any consent obtained would impose an unfair burden upon physicians:

> "No persuasive reason is advanced by defendants, nor is any apparent to this court, why physicians, to the exclusion of all other persons, should enjoy total immunity from liability where they intentionally deceive another into submitting to otherwise offensive touching to achieve a non-therapeutic purpose known only to the physician."

(*Id.*, at 941).

The court also rejected the defendants' argument that to find that non-disclosure of a non-therapeutic versus therapeutic purpose vitiates a consent, even where the offensive contact involved is identical, would be contrary to the policy considerations set forth in *Cobbs v. Grant*. In distinguishing the factual situation in *Cobbs* from that before the court in *Rains*, the court concluded that the logical consequences of the informed consent postulates and the policy considerations set forth in *Cobbs* were equally applicable where a non-therapeutic purpose has been concealed:

> "The emphasis in *Cobbs* upon the "intentional deviation from the consent given" is wholly consistent with the analysis in the present case . . . . The *Cobbs* situation is *qualitatively distinct from that where a physician intends to perform treatment for a nontherapeutic purpose when consent was given only for a therapeutic purpose. The latter case constitutes an intentional deviation from the consent given and is even more objectionable than a physician's good faith effort to effect a cure by exceeding the precise treatment to which consent was given.*" (emphasis added)

(*Id.*, at 941-942)

The duties of disclosure inherent in the fiduciary nature of the physician-patient relationship were clearly breached by the Defendants. On a number of different occasions and in a variety of ways, the Defendants either failed to disclose, concealed, or misrepresented information to the patient regarding the value of his cell line, their successful efforts to patent that cell line, their commercial activities to exploit it, and their individual financial interests in that exploitation.

Given his unique personal situation as a patient confronting a serious medical condition, Plaintiff was entitled to rely upon the superior expertise and knowledge of the Defendants as his sole source of information regarding his cells, their commercial potential, and Defendants' activities in exploiting them.

Furthermore, the information concerning the value of Plaintiff's cells, Defendants' patent on those cells, and their commercial and financial interests in their exclusive development, would clearly be relevant to the consent decision process of a reasonable person in Plaintiff's situation. Plaintiff specifically alleges that such information, beyond being relevant to his decision, would have been determinative in guiding the manner in which he sought further medical care.

In addition to this failure to obtain an informed consent, the consents described in the complaint obtained by the Defendants from the Plaintiff were vitiated and made ineffective due to the Defendants' failure to disclose their true non-therapeutic and financial purposes. This is true even though the identical medical contacts (i.e., the clinical and/or surgical withdrawals of Plaintiff's blood and

tissues) would have been involved even if full disclosure had been made and Plaintiff had consented.

Even if the same withdrawal of samples or surgical procedure had both a therapeutic and a nontherapeutic function, Defendants' failure to disclose material information concerning their nontherapeutic activities and commercial interests vitiated whatever consent had been obtained from the Plaintiff. In this regard, it is important to note that Plaintiff specifically alleges that none of the nontherapeutic commercial activities undertaken by the Defendants utilizing his tissues and cells were ever utilized in connection with his individual health care, diagnosis, or treatment (CTR 715:10-26; 718:19-28, 719:1-17).

2. Plaintiff Sets Forth a Cause of Action for Defendants' Failure to Obtain Plaintiff's Informed Consent Under Applicable Federal Laws and Regulations Governing Federally-Funded Human Research.

In addition to the existence of a physician-patient relationship and its attendant fiduciary duty of full disclosure, the Defendants' separate research activities upon Plaintiff's cells and tissues also created a simultaneous researcher-subject relationship between the parties (albeit without Plaintiff's knowledge). Therefore, in addition to the fiduciary duties of disclosure inherent in the physician-patient relationship, this simultaneous researcher-subject relationship gives rise to the application of the even stricter standards of informed consent in human research that have been long recognized by researchers, ethicists, the medical profession, and federal and state laws.

a. The Applicable Informed Consent Requirements for Federally Funded Research Involving Humans.

During the years following the revelations of the horrors of Nazi human experimentation during World War II, scientists, physicians, and ethicists became increasingly concerned with the concept of informed consent, concluding that the duty of disclosure owed a research subject patient was even greater than that which applied to the conventional physician-patient relationship.

These concerns with informed consent in the context of human research were eventually reflected in the promulgation in 1974 by the United States Department of Health, Education and Welfare (hereinafter "DHEW") of regulations setting forth the requirements for informed consent of human subjects (39 Fed. Reg. 18,914 [1974]). These requirements applied to all research in which human subjects were involved that were supported by federal DHEW grants (45 C.F.R. §46.1 [a] [1975], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]) and remained in effect until they were superseded by the revised, current regulations in 1981 (46 Fed. Reg. 8366 [1981]).

The 1974 federal regulations required that an entity proposing to place any human subject "at risk" must obtain a "legally effective informed consent from that subject" (45 CFR §46.9 [1975], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]). "Risk" was defined as any procedure which increased "the ordinary risks of daily life" (*Id.* §46.3[b], [c], [1]). "Informed consent" was defined as:

> "Knowing consent of an individual . . . so situated as to be able to exercise free power of choice without . . . any element of . . . *fraud, deceit,* duress, or other form of constraint or coercion." (emphasis added)

(*Id.* §46.3 [c]).

The use of any exculpatory or "release" language waiving or appearing to waive any of the patient's rights was absolutely prohibited. (*Id.* §46.9).

The basic elements of an informed consent pursuant to these regulations include explanation of the *purposes* of the experiment (*Id.* §46.3 [c] [1]), and description of *"any benefits* reasonably to be expected," (*Id.* §46.3 [c] [3]). The "benefits" which must be disclosed are not qualified or limited as to nature (financial or medical) or beneficiary (researcher, subject, or other persons).

More than a year prior to Plaintiff's first contact with Defendants, in a letter dated May 27, 1975 describing several amendments to these DHEW Regulations, the Office for Protection from Research Risks of DHEW stated that it was essential to *"fully document consent with respect to any subject at any time."* (Letter, Dr. D.T. Chalkey, Office for Protection from Research Risks, National Institutes of Health, DHEW, May 22, 1975 [emphasis in original], quoted in Holder and Levine, "Informed Consent for Research on Specimens Obtained at Autopsy or Surgery: A Case Study in the Overprotection of Human Subjects", 24 *Clinical Res.* 68, 68 [1976]).

As with the regulations promulgated in 1974, the 1981 regulations prohibit the use of exculpatory language and emphasize that the patient's consent must be

obtained without coercion or undue influence (45 C.F.R. at 46-116 [1982] *promulgated in* 46 Fed. Reg. 8366, 8386-9 [1981]).

The 1981 regulations also imposed an additional element of informed consent, requiring that, when appropriate, the patient was entitled to a disclosure statement that *if and when significant new findings occurred which would be potentially relevant to the patient's willingness to continue,* such information would be provided to the patient (45 C.F.R. §46.116 [b] [5] [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]).

b. Defendants' Withdrawal and Use of Plaintiff's Unique Cells for Research and Commercial Use Without His Informed Consent Violated Applicable Federal Regulations.

The 1974 federal regulations were applicable to the research performed by the Defendants utilizing Plaintiff's blood and bodily subtances [sic] which began in 1976. As admitted and verified in their application for the U.S. Patent on the "Mo-cell Line" composed of Plaintiff's cells (U.S. Patent No. 4,438,032, "Unique T-Lymphocyte Line and Products Derived Therefrom" granted March 20, 1984) (CTR 342-356) their research activities on the Mo-cell Line were supported by federal funding (CTR 334, Col. 1, lines 5-7). The Defendants have also published articles in medical and scientific journals regarding the Mo-cell Line indicating that research on the Mo-cell Line was supported by United States Public Health Service Grants (*See, e.g.*, Golde, Quan and Cline, "Human T-Lymphocyte Cell Line Producing Colony-Stimulating Activity,

52 *Blood* 1068 [1978] [citing support by United States Public Health Service Grants CA 15619, 15688, and RR 00865]; Saxon, Stevens and Golde, "T-Lymphocyte Variant of Hairy-Cell Leukemia, 88 *Annals Internal Med.* 323, 325 [citing support by United States Public Health Service Grant CA 12800, 15619, and 15688 and by National Institute of Health Training Grant AI 00431]).

By failing to disclose their true activities and motives to Plaintiff, the Defendants prevented Plaintiff from exercising his "free power of choice without . . . any element of . . . fraud, deceit, duress or other form of constraint or coercion." (45 C.F.R. §46.3 [c] [1975], *promulgated in* 39 Fed. Reg. 18, 914, 19,917-20 [1974]). The Defendants never revealed to Plaintiff the nature or purpose, nor even the existence of, the experimental research being performed on his blood cells (*Id.* §46.3 [c] [1]), and never described to Plaintiff the potential benefits of that research, whether in terms of Plaintiff's health or that of others, or the financial benefits to the Defendants (*Id.* §46.3 [c] [3]).

Under the 1974 federal regulations, research on pathological and diagnostic specimens, such as that performed by the Defendants on specimens of Plaintiff's surgically removed spleen and other blood and bodily substances beginning in 1976, clearly required the informed consent of the subject, as research on such surgically excised tissue is an experimental procedure related to a surgery or procedures which increased "the ordinary risks of daily life" (45 C.F.R. §46.3 [b], [c], [1], *promulgated in* 39 Fed. Reg. 18,914, 18,917-20 [1974]).

In addition to these regulations, National Institutes of Health (NIH) policy required that "that additional

informed consent be obtained to retain for research purposes an organ or fragment thereof removed at either autopsy or surgery – even when these procedures are done in accord with usual and customary medical practice." (Holder and Levine, cited *supra*, 24 *Clinical Res.* at 68 [1976]). This policy was to be applied to all NIH-supported research (*Id.* at 68); because the Defendants' research received direct NIH support, this 1975 policy was directly applicable to the Defendants' retention for research purposes of Plaintiff's surgically removed spleen.

Despite the subsequent modifications of these regulations which were promulgated in 1981, informed consent was still required for research on Plaintiff's pathological and diagnostic specimens. (45 C.F.R. §46.101 [b] [5] [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]). The revised regulations mandated that "no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject . . . " (*Id.* §46.116). The regulations define a "human subject" as "a living individual about whom an investigator . . . conducting research obtained (1) data through intervention or interaction with the individual, or (2) identifiable private information." (*Id.* §46.102 [f] [1982]).

While there are exceptions to this requirement, they are not applicable to the present case. The requirement does not apply to the study of existing pathological specimens or diagnostic specimens "if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be

identified, directly or through identifiers linked to the subjects." (*Id.* §46.101 [b] [5]).

The specimens which Defendants removed from Plaintiff's body fit neither exception. The defendants, in order to preserve their commercial interests, never made the specimens or cell lines developed from Plaintiff's blood and bodily substances publicly available until they were issued the Mo-cell line patent in 1984 (CTR 716:13-25; 722:19-22; 728:9-10; 729:1-4, 13-19; Golde "Availability of Mo and HTLV-II, 308 *Nature* 19 [1984]). Furthermore, because the cell line was labelled by the Defendants as the "Moore Cell Line" and the "Mo-Cell Line" and the Defendants published detailed case histories on Plaintiff John Moore, the specimens could be easily linked to Plaintiff Moore. (*See, e.g.*, Golde, Quan, and Cline, cited *supra*, 52 Blood 1068 [1978]; Saxon, Stevens, and Golde, cited *supra*, 88 *Annals Internal Med.* 323 [1978]).

During the period of regular blood withdrawals and research immediately following the splenectomy until 1981, the Defendants' conduct remained in violation of federal policies and regulations. Defendant Golde maintained his relationship as Plaintiff's physician and continued to conceal his research and commercial activities in which Plaintiff unknowingly played a vital and indispensable role (CTR 717:16-28; 718:1; CTR 718:19-28; 719, 720, 721:1-16). Thus, during the period the 1974 regulations and the 1975 policy were in effect and applicable to such research, the Defendants concealed the true nature of their research and concealed all of their commercial activities involving Plaintiff's blood and bodily substances (45 C.F.R. §46.3 [c] [1] (1975), *Promulgated in* 39 Fed. Reg.

18,914, 18,917-20 (1974)), never described the potential benefits of the research and commercial activities (*Id.* §46.3 [c] [3]), and never informed Plaintiff of the true purposes of the research (*Id.* §46.3 [c] [6]).

In the period following the amendment of the DHHS regulations in 1981, the Defendants continued to violate even the revised requirements. The Defendants continued to perform research on Plaintiff's diagnostic and pathological specimens, which were linked by identifiers to Plaintiff Moore's name by the use of the labels "Moore" and "Mo", without Plaintiff's knowledge or consent (45 C.F.R. §§46.101 [b], 46.116 [1982], *promulgated in* 46 Fed. Reg. 8366, 8386-91 [1981]). Defendants did not reveal to the Plaintiff the "significant new findings" regarding the cell line, its production of valuable by-products, and its commercial potential applications (*Id.* §46.116 [b] [5]), and did not reveal the existence of records identifying Plaintiff, the benefits of the research, or even the research and commercial use itself (*Id.* §46.116 [a] [1], [a] [3], and [a] [5]).

Plaintiff was first presented with written research consent forms over six years after his splenectomy, in April and September, 1983 (CTR 731:14-20; 732:24-25, 733:1-7). While the forms presented to the Plaintiff for his signature on his next-to-last and last visits to Defendants' medical facilities did indicate that research would be performed on specimens withdrawn from him on those occasions (Exhibit "A" to Plaintiff's Third Amended Complaint, CTR:758-759), those forms were in direct violation of DHHS regulations because they asked the subject to grant to the Defendants "any and all rights I, or my

heirs, may have in any cell line" or other potential products derived from the specimens (CTR 732:24-28, 733:1-7; 758). 45 C.F.R. §46.116 absolutely prohibits such waivers and provides that no informed consent, whether oral or written, may include "any exculpatory language through which the subject . . . is made to waive or appear to waive any of the subject's legal rights . . . " in the context of human research (*Id.* §46.116).

3. Plaintiff's Third Amended Complaint Sets Forth a Cause of Action for Lack of Informed Consent Under the California Protection of Human Subjects in Medical Experimentation Act.

The Protection of Human Subjects in Medical Experimentation Act of California (California Health and Safety Code, §24170 through 24179.5), passed by the California legislature in 1978, was applicable to all contacts and transactions between the Plaintiff and the Defendants during and following that year. Because the California statute is modeled largely after the similar federal regulations applicable to federally-funded human research, many of the same acts and omissions by the Defendants discussed as violations of the federal regulations *supra* also constitute violations of the California statute during the period during and after 1978 alleged in the complaint. (CTR 743:17-27).

Section 24172 of the Act sets forth an "Experimental Subjects Bill of Rights" and §24173 sets forth the requirements for "Informed Consent" in those situations in which a "medical experiment", as defined by §24174, is

being conducted. Section 24174 defines a "medical experiment" as "[t]he severance or penetration or damaging of tissues of a human subject . . . in the practice or research of medicine in a manner not reasonably related to maintaining or improving the health of such subject or otherwise directly benefiting such subject." (Health and Safety Code, §24174 [a]). Plaintiff's Third Amended Complaint specifically alleges that the research performed on Plaintiff's cells by the Defendants conducted without his knowledge or consent was not used, and was not intended to be used, in Plaintiff's actual medical care (CTR 712:21-27; 715:8-26; 717:10-15; 718:19-28, 719:12-17).

The Act also provides that subjects in such a medical experiment be provided with a copy of the "Experimental Subject's Bill of Rights" which "shall include, but not be limited to" the subject's right to be informed of the "purpose of the experiment." The subject must be "informed both verbally and within the written consent form, in non-technical terms . . . of . . . facts of the proposed medical experiment which might influence a decision to forego the experiment . . . " (Health and Safety Code §24173 (c)). Such facts specified by the statute include "the name of the sponsor or funding source, if any, . . . and the organization, if any, under whose general aegis the experiment is being conducted." (§24173[c][6])

During the visits to Defendant's facilities for blood withdrawals following the effective date of these statutes, and prior to April 11, 1983, Plaintiff was never presented with any written consent forms or "Experimental Subject's Bill of Rights" lists (CTR 717:16-28; 731:14-20). Furthermore, Plaintiff was never informed that commercial research upon his blood and bodily substances was being

funded after 1981 by the Defendants Genetics Institute and Sandoz pursuant to contracts with Defendants The Regents and Golde (CTR 728:1-13; 728:21-8; 729:1-4; 733 19-28).

Even on the occasions of Plaintiff's last two visits to Defendants' medical facilities, when forms were presented to him for his consent to participate in "research", Plaintiff was not given verbally or in writing in non-technical terms all of the important pertinent facts concerning the patenting and commercial exploitation of his cell line which may have influenced his decision to forego participation or request further information (CTR 731:21-23).

Clearly, the allegations of Plaintiff's Third Amended Complaint certainly raise triable issues of fact as to whether or not Defendants' conduct conformed to the duties of disclosure dictated by the fiduciary nature of the physician-patient relationship, as well as the more exacting duties owed to experimental subjects under applicable federal and California regulations and statutes. The Complaint sets forth more than sufficient allegations supporting a cause of action for Defendants' failure to obtain his informed consent, and therefore the rulings of Judge Deering and Judge Cole in sustaining the Defendants' special and general demurrers to this cause of action should be reversed.

D. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS FOR A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY.

a. The Physician-Patient Relationship is Fiduciary in Nature.

As was discussed in detail *supra* in connection with the cause of action for failure to obtain informed consent,

California courts have repeatedly recognized that the relationship between physician and patient is a fiduciary one (*Bowman v. McPheeters*, 77 Cal.App.2d 705, at 800; *Berkey v. Anderson*, 1 Cal.App.3d 790, at 804; *Garlock v. Cole*, 199 Cal.App.2d 11, at 15 [1962]). (To avoid unnecessary repetition, Plaintiff respectfully refers the court to the discussion of the fiduciary nature of the physician-patient relationship presented *supra* herein at pages 33-41).

b. As Fiduciaries, Physicians are Obligated to Render Full and Fair Disclosure to Their Patients.

Paramount among the duties of the fiduciary, and essential to the fiduciary's obligation to put the interests of the beneficiary above his or her own, is the duty of full disclosure. This duty has been recognized in all types of fiduciary relationships.

> The duty of the fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud . . . ".

(*Neal v. Magana, Olney, Levy, Cathcart and Gelfand*, 6 Cal.3d 176, at 188-89 [1971], quoting *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226 at 235 [1944]).

Of course, the physician-fiduciary is equally obligated to make a full and fair disclosure to the patient-beneficiary of "all facts which materially affect his rights and interests." (*Garlock v. Cole*, 199 Cal.App.2d 11, at 15

[1962], quoting *Bowman v. McPheeters*, 77 Cal.App.2d 795, at 800 [1947].

In light of the detailed discussion of Plaintiff's cause of action for conversion set forth *supra* herein, it is interesting to note that the California Supreme Court has held that "[s]ince a fiduciary has a duty to make a full disclosure of facts which materially affect the rights of the parties, it seems obvious that any act by him amounting to a conversation of trust property is akin to fraudulent concealment." (*Bennett v. Hibernia Bank*, 47 Cal.2d 540, at 561).

c. All Transactions Between Physician-Fiduciaries and Patient-Beneficiaries Must Meet Strict Standards of Good Faith and Fair Dealing, and are Subject to Close Judicial Scrutiny.

The duty of the fiduciary to make full disclosure to the beneficiary is especially pronounced in the context of a transaction between the two parties. Because the fiduciary must subjugate his or her own interests to those of the beneficiary, such transactions are subject to much judicial suspicion as involving abuse of trust and undue influence.

In this case, when Plaintiff agreed to allow the Defendants to withdraw specimens of his tissues and blood based upon their representations that the sole purpose for such withdrawals was the provision of medical care for his condition, a series of "transactions" took place between the Plaintiff and the Defendants which were both induced and carried out by the Defendants in their

capacity as physician-fiduciaries. By failing to disclose or concealing their knowledge of the value of Plaintiff's unique cells, their activities in patenting and commercially exploiting those cells, and their financial interests in the result of that exploitation, the Defendants breached their fiduciary duty to Plaintiff in dramatic fashion.

As stated by the Court of Appeal in *Werschkull v. United California Bank*, 85 Cal.App.3d 981 (1978):

> It is the settled law of this state, and elsewhere, that where there exists a relationship of trust and confidence, it is the duty of one in whom the confidence is reposed to make full disclosure *of all materials facts within his knowledge relating to the transaction in question*, and any concealment of material fact is a fraud . . . any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action."

(*Id.*, at 1001).

In the case of physicians, it has been recognized that the "duty of good faith and fair dealing is not limited to the professional relationship, but extends to other transactions between the physician and patient." (61 Am. Jur. 2d "Physicians, Surgeons, and Other Healers", §168 [1964]). The physician's position of trust and confidence are such that "his opportunities to influence the patient are unusual"; as a result, gifts and contracts between patient and physician are subjected to careful scrutiny because of the unique relationship, and may be set aside. (*Id.*, at §168).

The California courts have long recognized the suspect nature of transactions between physicians and

patients because of the obvious potential for breach of the inherent fiduciary duties by the physician, a danger so great as to make such transactions presumptively invalid. As early as 1891, the California Supreme Court invalidated a transaction in which a defendant-physician had convinced the plaintiff to convey a deed to the physician's daughter effective only on the plaintiff's death. The court found that "there was an advantage taken of a fiduciary relation between (plaintiff's physician) and the plaintiff, and the presumption is against the validity of the transaction." (*Krose v. Hillenbrand*, 88 Cal. 473, at 474 [1891]).

In 1903, the California Supreme Court was again confronted with a transaction between a physician and patient. In the case of *In re Wickes*, 139 Cal. 195 (1903), a female patient had left her entire estate to her attending physician at the hospital where she lived the last days of her life. The court stated:

> "There is no doubt of the general principle announced, that in transactions, such as the one under consideration here (between physician and patient), which may involve an abuse of confidence, they are scrutinized with great care by the court . . . the rule rests upon the principle, that proof of such confidential relationship excites the suspicion and jealousy of the court, and casts the duty on the beneficiary, affirmatively, to satisfy the conscience of the judge that such suspicion is unfounded."

(*Id.*, at 202).

In *Cole v. Wolfskill*, 49 Cal.App.52 (1920), the decedent had executed a promissory note for $12,500 for services to the plaintiff, her physician, during her life. A beneficiary

of her estate contended undue influence. In analyzing the transaction, the Court of Appeal stated:

> "It undoubtedly is the established rule that the relation of physician and patient is confidential; and the law demands *the strictest good faith and fair dealing in all transactions arising from that relationship*. . . . once this relationship is shown to exist, all dealings between the parties will be closely scrutinized *to ascertain if the confidence of the trusting party has been betrayed* or his mind unduly influenced to his prejudice."

(*Id.*, at 54).

In such cases the burden is on the fiduciary to demonstrate that the beneficiary acted after full disclosure of that fiduciary's interest. In fact, due to the trust and confidence reposed in the physician due to the fiduciary relation, fraud or undue influence are *presumed* when the fiduciary actively participates in obtaining an economic advantage over the patient-beneficiary, especially where concealment occurs. (Cal. Prob. Code §16004 [a] and [c]; *Fish v. Security-First Nat. Bank of Los Angeles*, 31 Cal.2d 378 [1948]).

It has been stated that "when a fiduciary relationship exists and the defendant abuses the confidence of the plaintiff, both law and equity have a most tender regard for the rights of the complaining party."(*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 643, citing *Werschkull v. United California Bank*, cited *supra*, at 1004).

Thus, the clear weight of authority dictates that any form of transaction arising in the context of the physician-patient relationship, in which the patient is unaware

that the physician stands to profit, as is alleged in Plaintiff's complaint, can only been viewed as an abuse of trust and a breach of the physician's fiduciary duty to the patient. This is so even if it is contended that somehow the plaintiff had "donated" the specimens of his blood and bodily substances to the defendants to facilitate his medical treatment, or, perhaps, to assist in their presumably purely academic and scientific efforts to determine the cause of plaintiff's disease.

d. Breach of Fiduciary Duty Constitutes Constructive Fraud.

In the context of a relationship of trust and confidence in which the fiduciary duty of full disclosure is well-recognized, any concealment of material facts within the fiduciary's knowledge relating to the transaction in question is fraud. (*Werschkull v. United California Bank*, cited *supra*, at 1001). Such material concealments or misrepresentations "amount to fraud sufficient to entitle the party injured thereby to an action" (*Id.*). Physicians can be liable for such fraudulent conduct like any other fiduciary. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 635 [1981]).

Such fraud by a fiduciary has been termed "constructive fraud", which arises from a breach of duty where a relationship of trust and confidence exists. (*Darrow v. Robert A. Klein and Co.*, 111 Cal.App. 310, at 315-16 [1931]). In *Estate of Arbuckle*, 98 Cal.App.2d 562 [1950], the Court of Appeal held that:

> "In its generic sense, constructive fraud comprises all acts, omissions and concealment

> involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another."

(*Id.*, at 568).

Thus, in the present case, because of the fiduciary duties imposed upon the defendants due to their physician-patient relationship with the plaintiff, the specific allegations that the defendants failed to provide plaintiff with full disclosure of material facts within their knowledge, constitute more than a sufficient basis for breach of fiduciary duty and constructive fraud.

e. Lack of Negligence or Dishonesty of Purpose by the Fiduciary Defendant Does Not Negate the Breech of Fiduciary Duty or Constructive Fraud.

Because of the high standard of conduct recognized by the law as being inherent in the fiduciary obligation, it is not necessary to plead or prove negligence or actual wrongful purpose when alleging breach of fiduciary duty and constructive fraud. As a result, the "requirement" set forth by Judge Deering in sustaining Defendants' demurrers that Plaintiff allege prior wrongful intent to state a cause of action is not supported by the law of fiduciary relationships.

In *Estate of Arbuckle*, cited *supra*, the Court of Appeals held that the destruction of the decedent's will by the manager of the decedent's estate was a violation of trust and confidence, despite the fact that it may have been

done in good faith, and therefore resulted in a constructive fraud upon the decedent and the beneficiaries, having all of the consequences of actual fraud. (*Id.*, at 570). The court held that "no positive dishonesty of purpose is required to show constructive fraud." (*Id.*, at 572, quoting *In re Dorrity's Will*, 118 Misc. 725, 194 NYS 573, at 575).

It is equally unnecessary to plead or prove negligence by the fiduciary, as a non-negligent fiduciary is just as capable of a breach. In *Barrett v. Bank of America*, 183 Cal.App.3d 1362 (1986), the court held that the absence of negligence on the part of a bank loan officer or the bank did not negate the breach of their fiduciary duty, and that a finding that the bank loan officer was not negligent did not preclude a finding of constructive fraud based on a breach of fiduciary duty. (*Id.*, at 21).

f. Breach of Fiduciary Duty Can Be Attributed to All Participants in a Common Plan as Aiders and Abettors.

Where there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they do the wrongful acts themselves. (*Certified Grocers of California, Ltd. v. San Gabriel Valley Bank*, 150 Cal.App.3d 281, at 289 [1983], citing *Tide Water Assoc. Oil Co. v. Superior Court*, 43 Cal. 2d 815, at 827 [1955]). Furthermore, a person who is not himself a fiduciary may be liable for breach of fiduciary duty as a result of colluding with a disloyal fiduciary (*Id.*, at 289, citing *Gray v. Sutherland*, 124 Cal.App.2d 280 [1954]). This concept was recently affirmed in *Heckman v. Ahmanson*, 168 Cal.App.3d 119 (1985), in which the court held that:

> "If it [the non-fiduciary] were an active participant in the breach of duty and reaped the benefit, it cannot disclaim the burden."

(*Id.*, at 127).

Defendants Genetics Institute and Sandoz are equally liable for breach of fiduciary duty as a result of their collusion with Defendants Golde, Quan, and The Regents, their active participation, and their acceptance of the resulting commercial and competitive benefits.

g. Breach of Fiduciary Duty Entitles the Wronged Beneficiary to a Constructive Trust and Punitive Damages.

By way of damages, Plaintiff's complaint contains prayers for compensatory damages, in an amount proportionate to the value of his contributive share of the Defendants' research and commercial activities exploiting his cells, other lost profits and economic losses, as well as the products, manifestations and other products of his cells which have been and continue to be commercially developed by the Defendants (CTR 740:21-28, 741, 742, 743:1-2; 744:26-28; 717:5-15). The complaint also seeks punitive damages (CTR 742:20-28; 743:1-2).

It is well-settled that the breach of a fiduciary duty is a tort, entitling the part injured thereby to recovery of full tort damages:

> "California law is committed to the view that the fraudulent breach of fiduciary duty is a tort, and the faithless fiduciary is obligated to make good the full amount of the loss of which his breach of faith is a cause."

(*Pepitone v. Russo*, 64 Cal.App.3d 685 at 688 [1976]).

In establishing appropriate remedies for breach of fiduciary duty, courts have frequently turned to the device of the "constructive trust." The cause of action is not based on the establishment of a trust, but consists rather of the fraud, breach of fiduciary duty, or other act which entitles the Plaintiff to some relief. (Witkin, *California Procedure* [2d Edition 1971], §696, p. 2319; *Kramer v. Biddleson*, 257 Cal.App.2d 720 at 724 [1968]).

In *Heckman v. Ahmanson*, 168 Cal.App.3d 119 (1985), the court of appeal held that where there is a pre-existing fiduciary relationship between the parties, the question of an adequate remedy at law does not arise. "The court, as a court of equity, acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust . . . " arising out of the relationship (*Id.*, at 134-35, citing *Bacon v. Grosse*, 165 Cal. 481, at 493 [1913]).

The purpose of the remedy of constructive trust, the court explained, is "to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong." (*Id.*, at 135). As a result, the court concluded, the plaintiff is entitled to trace the property take from him by means of the fiduciary's wrongdoing to the actual profits that property has generated as a result:

> "Thus, under a constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit."

(*Id.*)

Furthermore, where the beneficiary has been harmed by a breach of the fiduciary's duty or fraud, the remedy of punitive damages is also available. This has been held

to be equally applicable to the fiduciary duties owed by physicians to their patients. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 643 [1981], citing *Althino v. Starr*, 112 Cal.App.3d 158, at 178 [1980]).

E. PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR FRAUD AND DECEIT.

Plaintiff's Third Amendment Complaint contains detailed allegations supporting a cause of action for actual fraud, as well as a cause of action for constructive fraud. In addition, many of the same factual allegations support Plaintiff's separate causes of action for negligent misrepresentation, unjust enrichment, quasi-contract, and intentional interference with prospective advantageous economic relationships, which are rooted in the same legal doctrines as breach of fiduciary duty and fraud and deceit.

1. Allegations Constituting the Elements of a Cause of Action For Actual Fraud.

A recital of the necessary elements required to allege a cause of action for fraud and deceit was recently set forth by the Court of Appeal in *Molko v. Holy Spirit Association for the Unification of World Christianity*, 179 Cal.App.3d 450 (1986):

> "The elements of fraud, which give rise to the tort action for deceit, are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or "scienter");

(3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage."

(*Id.*, at 464, quoting *Witkin*, Summary of California Law [8th Ed. 1974] Torts, § 446, p. 2711).

These same elements were found to be equally applicable to a situation in which a cause of action for fraud had been alleged against a physician by his patient. (*Nelson v. Gaunt*, 125 Cal.App.3d 623, at 635 [1981]).

It has recently been held that the intent required is only the intent to induce the injured party to rely or act in such a fashion as to alter his position to his detriment. In the case of *In re Cheryl E.*, 161 Cal.App.3d 587 (1984), the Court of Appeal held that "no actual intent to defraud on the part of the defendant need be shown, as fraud includes not only intentional misrepresentations but also negligent misrepresentations . . . thus, 'scienter' is not an element of every cause of action for deceit." (*Id.*, at 599).

Once again, the emphasis of Judge Deering and Judge Cole in requiring that Plaintiff allege a conscious wrongful intent on the part of the Defendants from the very inception of their relationship does not appeal to be supported by California decisional law. Nevertheless, Plaintiff's Third Amended Complaint *does* set forth allegations of wrongful intent on the part of the Defendants as well as knowledge of the falsity of their representations and the probable effect of their non-disclosures.

Detailed factual allegations containing each of the elements required to plead a cause of action for fraud and deceit are contained throughout Plaintiff's Third Amended Complaint. Factual allegations concerning misrepresentations, false representations and concealments

or non-disclosures by the Defendants concerning the value of Plaintiff's unique blood and bodily substances, Defendants' activities in developing and exploiting Plaintiff's blood and bodily substances, Defendants' efforts to patent Plaintiff's cells, and Defendants' actual financial interests in commercially exploiting those cells are contained, *inter alia*, in Plaintiff's complaint at the following paragraphs: ¶15 (CTR 712:14-27); ¶18 (CTR 713:22-26); ¶19 (CTR 714:6-10); ¶33 (CTR 718:19-28); ¶35-37 (CTR 719:18-28, 720:1-19); ¶43 (CTR 731:21-28, 732:1-2); and ¶53 (CTR 735:10-28). In fact, ¶39-41 of Plaintiff's Third Amended Complaint sets forth a detailed list of 25 facts or events concealed by the Defendants from Plaintiff throughout the period of their interaction. (CTR 721-730, 731:1-13).

Factual allegations concerning the Defendants' knowledge of the falsity of their representations are contained *inter alia* in the following paragraphs of Plaintiff's complaint: ¶8-10 (CTR 711:4-19); ¶14 (CTR 713:9-15); ¶34 (CTR 719:2-12); ¶38 (CTR 720:20-28); ¶39-40 (CTR 721:-23); ¶41 (CTR 721:24-28, 722-730, 731:1-13); ¶50 (CTR 734:1-10); and ¶53 (CTR 735:10-28).

Factual allegations regarding Defendant's intent to induce reliance are set forth in numerous paragraphs of Plaintiff's complaint, especially ¶14 (CTR 712:6-13); ¶16 (CTR 713:1-8); ¶21 (CTR 714:19-22); ¶30 (CTR 717:16-28); ¶32-34 (CTR 718:10-28, 719:1-17); ¶38 (CTR 720:20-28); ¶39 (CTR 721:1-16); ¶48 (CTR 733:8-12); ¶52-53 (CTR 734:18-28, 735 1-28); and ¶61 (CTR 739:9-25).

Factual allegations setting forth Plaintiff's justifiable reliance upon Defendants' misrepresentation and the

basis for that reliance are set forth in the following paragraphs of Plaintiff's complaint: ¶3 (CTR 708:20-28, 709:1-7); ¶5 (CTR 710:1-23); ¶12 (CTR 711:24-28); ¶16 (CTR 713:1-8); ¶38 (CTR 720:20-28); ¶20-21 (CTR 714:11-22); ¶25 (CTR 715:27-28, 716:1-5); ¶30 (CTR 717:16-24); ¶31-32 (CTR 718:6-14); ¶44 (CTR 732:3-18); ¶48 (CTR 733:8-18); and ¶52 (CTR 734:18-28, 735:1-9).

Allegations of Plaintiff's damages resulting from Defendants' fraud and deceit are set forth in ¶27-29 (CTR 716:13-28, 717:1-15), and ¶63-71 (CTR 740:21-28, 741-742, 743:1-2) of Plaintiff's complaint. Thus, Plaintiff has more than adequately alleged each of the elements required to set forth a cause of action for actual fraud, fraudulent misrepresentation, or fraud and deceit under California law.

2. Allegations Setting Forth the Elements of a Cause of Action for Constructive Fraud.

As discussed in detail *supra* herein in connection with the cause of action for breach of fiduciary duty, the existence of a relationship of trust and confidence between the patient-plaintiff and the physician-defendants, as well as their collusive aiders and abettors, makes available to Plaintiff a cause of action for constructive fraud. Constructive fraud is recognized to exist only in those situations in which a fiduciary or special relationship exists between the parties, and differs from actual fraud primarily in the degree to which the wrongful intent of the defendant is relevant. Civil Code §1573 provides for the application of constructive fraud principles:

> "(1) in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

Thus, it has been held that constructive fraud includes all acts, omissions and concealments involving the breach of legal or equitable duties, trusts, or confidences, which result in damages to another. In *Barrett v. Bank of America*, 183 Cal.App.3d 1362 (1986), the Court of Appeal held that constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated – that is, in which such conduct is a constructive or quasi-fraud, having all the consequences and legal effects of actual fraud." (*Id.*, at 20, quoting *Estate of Arbuckle*, 98 Cal.App.2d 562, at 568 [1950]).

In the context of a relationship of trust and confidence, the heightened responsibility of the fiduciary, along with dependence and reliance of the beneficiary, create a situation in which even passive non-disclosure is considered constructive fraud. In *Crayton v. Superior Court*, 165 Cal.App.3d 443 (1985), the Court of Appeal considered the question of "passive concealment" as compared to "affirmative concealment" in allegations of fraud. Quoting *Prosser on Torts* (4th Ed. 1971), "Representation and Non-Disclosure", §106, page 697 the court stated:

> "The general rule is that misrepresentation by passive concealment (as opposed to affirmative concealment) violates a duty to disclose only

> where there is a special fiduciary relationship between the parties or where 'the defendant has special knowledge, or means of knowledge, not open to the plaintiff, and is aware that the plaintiff is acting under a misapprehension as to facts which would be of importance to him and would probably affect his decision.' "

(*Crayton v. Superior Court*, cited *supra*, at 451).

Therefore, in the circumstances of the present case, where the Defendants not only had specialized expertise and knowledge superior to that of the Plaintiff in the relevant scientific fields, but also were active participants in events which the Plaintiff could not have witnessed nor been aware of, and where Plaintiff's continued cooperation with the Defendants in his medical care was made possible only through his ignorance of Defendants' true commercial activities, even a "passive" failure to disclose amounts to a constructive fraud.

Once again, it is important to note, in light of the rulings by Judge Deering and Judge Cole, that allegations of dishonest purpose are not necessary to support a cause of action for constructive fraud. In *County of Santa Cruz v. McLeod*, 189 Cal. App. 2d 222 (1961), the Court of Appeal made it clear that fraudulent intent by the defendants is not a necessary element of constructive fraud:

> "Constructive fraud, as contrasted to actual fraud, may be defined as a breach of legal or equitable duty which, irrespective of the moral guilt or intent of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests."

(*Id.* at 234, quoting *Bell v. Bell*, 44 Ariz. 520).

Nor does failure to allege or prove negligence on the part of the fiduciary preclude a finding of constructive fraud in the context of a relationship of trust and confidence. (*Barrett v. Bank of America,* 183 Cal.App.3d 1362 [1986]).

i. The Corporate Defendants are Equally Liable for Fraud Where They Aided and Abetted a Breach of Fiduciary Duty by The Medical Co-Defendants, or Accepted the Benefits of That Fraud.

As demonstrated *supra* herein in the discussion of fiduciary duty, it is clear that liability for breach of fiduciary duty constituting constructive fraud can be attributed to all the participants in a collusive activity as aiders and abettors. In addition, accepting the proceeds of an actual or constructive fraud can amout [sic] to a knowing ratification that subjects a defendant collaborator to liability. (*Nicholson v. Rose,* 106 Cal.App.3d 457 [1980]).

ii. Sufficient Allegations of Damages are Presented to Support a Cause of Action for Actual or Constructive Fraud.

Because the defendants stood in a fiduciary relationship to the Plaintiff, the damages available when fraud is alleged must be measured pursuant to the broad provisions of Civil Code §333 and §1709, which govern compensation for torts in general. (*Walters v. Marler,* 83 Cal.App.3d 1 [1978]).

Furthermore, the very nature of actual or constructive fraud also supports the award of punitive damages:

> "It suffices to note that (Civil Code §3294) specifically authorizes punitive damages for "fraud, or malice, express or implied." And fraud itself implies malice. Thus, the award of punitive damages is supported by evidence of both fraud and implied malice."

(*Nicholson v. Rose*, cited *supra*, at 462).

This liability for punitive damages stemming from fraud extends equally to corporate defendants, which, like those in this case, have authorized and funded the wrongful acts constituting the fraud by their collaborators or agents, or by ratification through acceptance of the wrongfully obtained proceeds. (*O'Hara v. Western Seven Trees Corp.*, 735 Cal.App.3d 798, at 806 [1977], citing *Ebaugh v. Rabkin*, 22 Cal.App.3d 891 at 895 [1972]).

Therefore, it is clear that Plaintiff has set forth sufficient allegations to support a cause of action for fraud and deceit, be it considered actual fraud, or constructive fraud based on the breach of fiduciary duties by the Defendants and their collaborators. Therefore, the ruling of the Superior Court in sustaining Defendants' general demurrers to the fourth cause of action for fraud and deceit was in error and should be reversed.

F. PLAINTIFF'S COMPLAINT SETS FORTH SUFFICIENT ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR DECLARATORY RELIEF.

The purpose of declaratory relief is to liquidate uncertainties and controversies which may result in

future litigation (*Fagerstedt v. Continental Insurance Company*, 266 Cal.App.2d 370, at 372 [1968]), and hence, to quiet or stabilize an uncertain or disputed legal relation by permitting a prompt adjudication of the respective rights and obligations of the parties. (*Tiburon v. Northwestern Pacific Railroad Company*, 4 Cal.App.3d 160, 163 [1970]; *Lortz v. Connell*, 273 Cal.App.2d 286, 301 [1969]).

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties and requests that these rights and duties be adjudged by the court. (*Maguire v. Hibernia Savings and Loan Society*, 23 Cal.2d 719, 728 [1944]. Because the Code of Civil Procedure, Section 1060 contains no suggestion that the plaintiff must allege facts entitling him to a favorable decision if the complaint meets the foregoing requirements, the court must declare the rights of the parties, whether or not the facts establish that plaintiff is entitled to a favorable judgment. (*Id.*, at 730; *Bennett v. Hibernia Bank*, 47 Cal.2d 540, 550 [1956]). If the Plaintiff is not entitled to a favorable determination, the court should render a judgment embodying such determination and not merely dismiss the action. For a Superior Court to sustain a demurrer to such a complaint without leave to amend or to enter judgment on the pleadings dismissing the action is error. (*Wilson v. Board of Retirement*, 156 Cal.App.2d 195, 200 [1957]; *Maguire*, cited *supra* at 731).

There currently exist uncertainties and controversies of a legal, equitable, and ethical nature raised by this case that require judicial resolution. At the center of these controversies are the duties and responsibilities owed by

the Defendants to the Plaintiff due to his status as a medical patient, an unknowing research subject, and an unwitting source of unique and commercially valuable blood cells. The nature of the property interest a human being has in his or her own living cells, especially when they possess unique properties that can be exploited commercially by a physician and his collaborators in the context of a physician-patient relationship without the patient's knowledge, is an important disputed issue raised by the facts of this case.

In light of the currently pending patent applications submitted by the Defendants on the genetic sequences encoding the unique properties of Plaintiff's cell line (CTR 730:7-20) and because product development and clinical testing are proceeding apace on the lymphokine products based upon Plaintiff's unique cells, the need for declaratory relief is great with regard to the interests of the parties herein, and grows even as this appeal is being considered.

Since the filing of this lawsuit, the important legal issues raised by this case have been the focus of debate and analysis in the legal, medical, ethical, biotechnological and legislative communities. This case has prompted at least two recent law review articles in which the issues of patients' rights and informed consent raised by the case are thoroughly explored. (Delgado and Leskovac, *Informed Consent In Human Experimentation: Bridging The Gap Between Ethical Thought And Current Practice*, 34 UCLA L.Rev. 501 [1987]; Comment, *Toward The Right Of Commerciality: Recognizing Property Rights In The Commercial Value Of Human Tissue*, 34 UCLA L.Rev. 208 [1987]).

In one of these articles, Professor Richard Delgado of the School of Law, University of California, Davis, and his co-author, Helen Leskovac, cite the instant case as an example of the courts confronting conflicts of interest in the researcher-subject and physician-patient relationships, and conclude that, just as the physician has a fiduciary relationship with the patient, the researcher has a fiduciary relationship with the human subject. (Delgado and Leskovac, cited *supra*, at 518-521, fn. 78-83, 540 *et seq.*)

In another recent law review article, the present case is used as the basis for an analysis of the various property and commercial interests involved when human tissue is utilized to become a profitable biotechnology product. The author advocates a recognition by the courts of the patient's or human source's "right of commerciality" in products developed from that person's living biological materials, especially where those materials are unique or essential to the commercial development process. (Comment, *Toward The Right Of Commerciality: Recognizing Property Rights In The Commercial Value Of Human Tissue*, cited *supra*, at 258 *et seq.*) The author concludes:

> "The advent of biotechnology has made the human body valuable property. Unfortunately, legal doctrine has yet to consider its pecuniary worth or the various rights of the parties involved in developing human cell products. Until this time, the little protection bestowed by courts has concerned only the rights of the researchers and companies involved. This places the patient in a disadvantageous and vulnerable position, thereby further compounding the inequities previously existing in the patient-researcher relationship. . . . Even without considering public opinion, equity and justice

> demand fair compensation for the patient's contribution.
>
> The courts now have the opportunity to address these inequities [citing the instant case]. The clearest way to do this is by recognizing property rights in the human body."

(*Id.*, at 263)

This case has also been the subject of a medicolegal ethics article in which a project director in medical law at the American Bar Foundation concludes that donors, recipients, and society would benefit from a legal recognition that "people's body parts are their personal property," and that individuals "have the autonomy to treat their own parts as property, particularly their regenerative parts." (Andrews, *My Body, My Property*, Hastings Center Rep., 16:5 [October 1986], 28, at 37.)

This case was instrumental in bringing about a congressional hearing on the role of patients, researchers, universities, and private companies in the development and marketing of human biological products before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology of the U.S. House of Representatives on October 29, 1985. (Delgado and Leskovac, *supra*, at 519, fn. 80; CTR 970:8-16). Plaintiff herein testified at the hearing at the invitation of the Subcommittee.

In preparation for the hearing, the staff of the Subcommittee on Investigations and Oversight conducted a questionnaire survey which showed a significant and impressive rise in the use of human biological materials in research, and a substantial increase in recent years in

patent applications for products derived from human biological materials. (CTR 970:9-21; CTR 972-973).

Subcommittee Chairman Harold L. Volkmer, in presenting the results, commented that, despite this increase in the use of human patient and human subject materials in research leading to patents on biomedical products, none of the consent forms utilized and provided by the respondents included any statements informing the patient of any commercial benefits, commercial projects, or commercial rights of these patient-sources of the human biological materials. (CTR 970:24-28, 971:1-5). These data further indicate the nationwide importance and scope of the issues presented by Plaintiff's Third Amended Complaint, as well as the clear need for judicial resolution of the profound legal and ethical questions presented by this case.

As demonstrated in the discussion *supra* of the various causes of action alleged in Plaintiff's complaint and the factual allegations which support those causes of action, it is Plaintiff's position that the proper application of well-recognized theories of liability to the facts alleged in this case can remedy the wrong described. While the facts are somewhat unusual and in large measure a product of our technological era, the well-recognized legal concepts of informed consent, fiduciary duty, patients' rights, fraud, constructive trust and conversion are offered for this court's consideration as suitable vehicles for resolving the issues presented by this case.

However, should this court disagree with Plaintiff's analysis of the various specified causes of action set forth in the complaint, or find that those causes of action are

inapplicable to the unique facts presented in this case, Plaintiff respectfully reminds this Court that the law of torts is not an immutable body of rigid classifications. As Prosser has instructed, "the common thread woven into all torts is the idea of *unreasonable interference with the interests of others.*" (Prosser on Torts, §1, at 6 [4th Ed., 1971]).

In *Smith v. Superior Court of Los Angeles County*, 151 Cal.App.3d 491 (1984), the Court of Appeal observed that California has long recognized that for "every wrong there is a remedy" (Civil Code Section 3523), and California courts have allowed for new torts through the legislative and judicial processes. (*Id.*, at 496). The court recognized the historical tradition of tort law evolving and adapting with the needs and realities of society:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. *When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant,* the mere fact that the claim is novel will not of itself operate as a bar to the remedy."

(*Id.*, at 495-96, quoting Prosser on Torts, §1, at 3-4)

This common law tradition and the principles of notice pleading are especially relevant in this appeal, in which the court is asked to review a judgment entered upon the sustaining of a general demurrer to Plaintiff's entire complaint. As the Court of Appeal stated in *Taylor*

v. S. & M. Lamp Company, 190 Cal.App.2d 700 (1961), essentially all that is necessary for plaintiff to be entitled to some relief is that his complaint has adequately alleged that his interests have been unreasonably interfered with:

> "All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. The complaint is to be liberally construed . . . if upon a consideration of all of the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendant, the complaint will be held good although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged . . . although a plaintiff may have misconceived his remedy, if his complaint states a cause of action upon any theory he is entitled to introduce evidence thereon and it is error to sustain a general demurrer or to grant a motion to exclude evidence."

(*Id.*, at 704, quoting *Domino v. Mobley*, 144 Cal.App.2d 24, 27-28 [1956] and citing *Clark v. Lesher*, 106 Cal.App.2d 403 [1951]).

Upholding the dismissal of Plaintiff's action in this closely watched case will only reassure those few biogenetic firms and physician researchers willing to transcend ethical, moral and legal boundaries for profit that they may abuse patient's rights and the public trust without penalty. It would signal that the law will look the other way and ignore the individual and property rights of patients, who, like Plaintiff, in relying on the trust inherent in the physician-patient relationship, may be subjected to the kind of deceptive practices and abuse of that

trust that are alleged herein, and which may be committed by these Defendants or others with similar intentions in the future. It would allow such breach of duty and deception to be rewarded with commercial profit, contrary to the maxim of jurisprudence, set forth in Civil Code §3517, that "(n)o one can take advantage of his own wrong."

IV. CONCLUSION

Plaintiff's Third Amended Complaint provides an astonishing insight into how the unique properties of this medical patient's cells, without his knowledge or consent, became the subject of lucrative stock deals, several patents, commercial exclusivity and secrecy agreements, and a prized commodity in the highly competitive, international biotechnology industry driven by the lure of profit.

This case concerns patient's rights, or, more specifically, the disregard of those rights by those in a position of trust and confidence as a means to advance their own design for commercial profit and competitive advantage. It is a case in which a physician and a university, and their commercial collaborators, in the context of providing medical care, abused the special trust and confidence on which patients should be entitled to rely, and exploited a seriously ill patient by taking from him, without his knowledge or consent, unique and valuable living substances which were essential to their concealed commercial activities.

These hidden commercial activities and appropriations of his cells played no role in the patient's actual health care, but were intended and carried out solely for

the financial and competitive benefit of the physician and his collaborators. Ironically, all of this took place because Plaintiff John Moore sought treatment from a physician for a rare form of blood disorder, relied on the trust inherent in the physician-patient relationship, followed his physician's request, and tried to be a cooperative patient.

Plaintiff did not invent the disturbing and important questions raised by the factual allegations set forth in his Complaint, nor did he invent the widespread concern and attention focused on this case within the legal, medical, academic, ethical, and legislative communities. While the facts may be novel, it is clear that well-established doctrines of tort liability, including conversion, informed consent, fiduciary duty, and fraud, along with the other causes of action pleaded, are clearly supported by the detailed factual allegations set forth in Plaintiff's Third Amended Complaint. The Superior Court's insistence on allegations of prior wrongful intent, absence of any therapeutic purpose, and its reliance on an undefined notion of implied consent to "medical and scientific study," clearly are not supported by decisional, regulatory, or statutory law. Therefore, Plaintiff respectfully suggests that the Superior Court rulings sustaining the general Demurrers of these Defendants to each of Plaintiff's thirteen causes of action was in error, and the dismissal of Plaintiff's Third Amended Complaint in this action and entry of judgment thereon should be reversed.

DATED: August 26, 1987

SANFORD M. GAGE
JONATHAN T. ZACKEY

GAGE, MAZURSKY, SCHWARTZ
ANGELO & KUSSMAN

By: /s/ Sanford M. Gage
SANFORD M. GAGE

By: /s/ Jonathan T. Zackey
JONATHAN T. ZACKEY
Attorneys for Plaintiff
and Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9454 Wilshire Boulevard, Suite 501, Beverly Hills, California 90212.

On August 26, 1987 I served the foregoing document described as APPELLANT'S OPENING BRIEF on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Peter Abrahams, Esq.
Horvitz, Levy & Amerian
15760 Ventura Blvd.,
18th Fl.
Encino, CA 91436

Anthony Murray, Esq.
Ball, Hunt, Brown
& Baerwitz
4525 Wilshire Blvd., 3rd Fl.
Los Angeles, CA 90076

Allen B. Wagner, Esq.
Office of the General
Counsel
590 University Hall
Berkeley, CA 94720

Richard M. Coleman, Esq.
1801 Avenue of the Stars
Suite 810
Los Angeles, CA 90067

Ian Crawford, Esq.
Jack G. Fabiano
Hale & Dorr
60 State Street
Boston, MA 02109

Robert Dougherty, Esq.
Covington & Crowe
1131 W. 6th Street, Ste. 300
Ontario, CA 91762

Clerk of the Superior Court
111 North Spring Street
Los Angeles, CA 90012

Court of Appeal
Second Appellate District
3580 Wilshire Boulevard
Room 301
Los Angeles, CA 90010
(Original plus 3 copies)
(Hand Delivered)

The Supreme Court of the
State of California
3580 Wilshire Boulevard
Room 213
Los Angeles, CA 90010
(7 Copies)

The Honorable Warren H.
Deering
111 North Hill Street
Department 88
Los Angeles, CA 90012

The Honorable John Cole
3580 Wilshire Boulevard
Room 307
Los Angeles, CA 90010

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Beverly Hills, California.

Executed on August 26, 1987 at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Julie Krauss
JULIE KRAUSS

Appellate No. B021195

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

Consolidated Appeal From Separate Judgments of the Superior Court of Los Angeles County
The Honorable Warren H. Deering and John L. Cole, Judges

LAW OFFICES OF GAGE,
MAZURSKY, SCHWARTZ,
ANGELO & KUSSMAN

By: SANFORD M. GAGE
CHRISTOPHER E. ANGELO
JONATHAN T. ZACKEY

9454 Wilshire Boulevard, Fifth Floor
Beverly Hills, California 90212
(213) 273-0904

Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT 1

II. REPLIES TO RESPONDENTS' ARGUMENTS .. 2

A. RESPONDENTS' ATTEMPTS TO ALTER OR DISTORT IMPORTANT FACTUAL ALLEGATIONS OF THE COMPLAINT ARE IMPROPER AND SHOULD BE DISREGARDED AS SELF-SERVING AND MISLEADING 2

1. The Valuable Characteristics of Plaintiff's Cells Are Inherent, and Not the Product of Respondents' "Invention" .. 3

2. Prior to Examining Plaintiff, Respondents Were Aware That Cells With the Characteristics of Plaintiff's Cells Would Be Valuable 4

3. Respondents Arranged to Retain Quantities of and Perform Separate Non-Therapeutic Research on Plaintiff's Cells Prior to the Splenectomy 5

4. Plaintiff Was Not Aware of, and Gave No Consent to, Non-Therapeutic or Commercial Research Prior to the Splenectomy 5

5. Respondents' Separate Commercial Research Activities on Plaintiff's Cells Were Totally Unrelated to His Medical Care 6

TABLE OF CONTENTS – Continued

Page

6. Information on Respondents' Concealed Commercial Research Activities Would Have Been Material to Plaintiff's Consent 6

7. The Focus of This Case Is a Seven-Year Physician-Patient Relationship, Not Just a Single Operation 7

8. The Semiannual Blood Samples Taken Throughout This Seven-Year Period Were Important to Respondents' Commercial Efforts 8

9. The Seven-Year Physician-Patient Relationship Coincided With Intensive Commercial Development of Plaintiff's Cells 9

10. Plaintiff Was Never Informed of the Non-Therapeutic Commercial Utilization of These Semiannual Blood Withdrawals 12

11. Respondents' Consent Forms Offered to Plaintiff In 1983 Admitted His Rights In His Cell Line and Products 14

12. Respondents Can Offer No Explanation For Their Failure to Inform Plaintiff of Their Commercial Activities Using His Unique Cells Other Than to Protect Their Economic Self-Interest .. 16

TABLE OF CONTENTS – Continued

Page

B. RESPONDENTS' ATTEMPTS TO MANIPULATE AND DISTORT THE FINDINGS AND RULINGS OF THE LOWER COURT SHOULD BE DISREGARDED IN FAVOR OF THE ACTUAL MINUTE ORDERS AND HEARING TRANSCRIPTS AT ISSUE IN THIS APPEAL 17

1. The Superior Court's Demurrer Rulings Did Not Constitute a Wholesale Rejection of Each Cause of Action Alleged 18

2. The Superior Court Indicated Agreement With Appellant's Central Contention That Nonconsensual Commercial Exploitation Is Not Privileged 24

3. Respondents Genetics Institute and Sandoz Pharmaceuticals Corporation's Mischaracterizations of the Superior Court's Ruling Ignores the Fact That No Leave to Amend Was Granted to Plaintiff 29

C. CONTRARY TO THE CONTENTIONS OF RESPONDENTS GENETICS INSTITUTE AND SANDOZ, FACTS CONSTITUTING THE NECESSARY ELEMENTS OF A CIVIL CONSPIRACY HAVE BEEN PLED 31

D. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF AN AGENCY OR JOINT VENTURE RELATIONSHIP AMONG DEFENDANTS 34

TABLE OF CONTENTS – Continued

Page

E. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH FACTS SHOWING RATIFICATION OF THE WRONGFUL ACTS COMMITTED BY DEFENDANTS THE REGENTS, GOLDE, AND QUAN PRIOR TO THE EXECUTION OF THE WRITTEN COLLABORATIVE AGREEMENTS BY DEFENDANTS GENETICS INSTITUTE AND SANDOZ.... 37

F. RESPONDENTS THE REGENTS, GOLDE AND QUAN'S CLAIM OF IMMUNITY SHOULD BE REJECTED..... 38

1. Eleven of Plaintiff's Thirteen Separate Causes of Action Do Not Involve Misrepresentation as a Necessary Element and the Complaint Specifically Alleges Defendants' Conscious Intent to Deceive 42

G. THE "PUBLIC POLICY" RATIONALES OFFERED BY RESPONDENTS DO NOT JUSTIFY AWARDING THE WRONGDOING ALLEGED WITH COMMERCIAL PROFIT 44

III. CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Black v. Sullivan (1977) 48 Cal.App.3d 557 32

Bowman v. McPheeters (1947) 72 Cal.App.2d 795 20

Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305,..... 33

DeVries v. Brumback (1968) 53 Cal.2d 643 33

Gonzalez v. State of California (1977) 68 Cal.App.3d 621..... 30

Johnson v. State (1968) 69 Cal.2d 782 39

Meyer v. City of Oakland (1980) 107 Cal.App.3d 770 39

Michael R. v. Jeffrey B. (1984) 158 Cal.App.3d 1059 33

Muskopf v. Corning Hospital District (1961) 55 Cal.2d 211..... 39

Pollack v. Lytle [1981] 120 Cal.App.3d 931 2

Rains v. Superior Court (1984) 150 Cal.App.3d 933 20

Ramos v. County of Madera (1971) 4 Cal.3d 685..... 39

Schonfeld v. City of Vallejo (1975) 50 Cal.App.3d 401 .41, 43

Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616..... 32

Weatherton v. Growers Farm Labor Association (1969) 275 Cal.App.2d 168..... 32

Wyatt v. Union Mortgage Company (1979) 25 Cal.3d 773..... 32

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Civil Code § 2310 38

Civil Code § 2338 35

Government Code § 815.2 ..... 39, 40

Government Code § 818.8 ..... 39, 40

Government Code § 822.2 ..... 39, 40, 41, 43

45 CFR § 46-116 [1982] 15

46 Fed. Reg. 8366, 8386-9 [1981] 15

MISCELLANEOUS

W. Keeton, *Prosser and Keeton on the Law of Torts* (1984), § 72 at 516-517 36

3 Witkin, *California Procedure* (2d Ed. 1971) Pleading, § 773, p. 2839 33

2 Witkin, *Summary of California Law*, Torts, § 15 32

Testimony of Dr. David A. Blake before the Subcommittee on Investigations and Oversight, Committee on Science and Technology, October 29, 1985 ..... 47, 48

Testimony of Dr. Thomas H. Murray before the Subcommittee on Investigation and Oversight, Committee on Science and Technology, October 29, 1985 ..... 48, 49, 50

Wall Street Journal, "NASDAQ Prices and Quotes", March 24, 1988 11

I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT.

Plaintiff-Appellant John Moore offers this Reply Brief in the hope of dispelling the confusion created by the five Respondents' Briefs. The Respondents have attempted to introduce unproven facts contradicted or not pled in the Complaint, to mischaracterize and misinterpret the rulings below, and to insulate themselves from liability for the wrongful conduct alleged through inapposite public policy rationales and immunities.

Despite their efforts, the basic issue involved in this appeal must remain clear. At stake is the well-recognized right of the patient to be free from commercial research and exploitation by his own physician without his knowledge or consent. At issue is whether society should reward with profit a physician who has discovered his patient is a unique source of a commercially valuable product, which the physician, his public university employer, and their for-profit commercial partners have secretly decided to exploit for personal gain without ever informing the patient or allowing him to participate. At stake in this appeal is the right of patients to decide whether or not to participate in human research, and the frightening prospect of removing that right from the patient and bestowing authority on the physician-researcher to unilaterally decide what is best for the patient, and what is best for society, as determined by the financial interests of the physician in the result, and without disclosure to the patient.

The Respondents' Briefs offer no legal, moral, or ethical basis for dismantling our society's well-settled

protection of human self-determination, or insistence on strict adherence to the duties imposed by the relationship of trust and confidence inherent in and necessary to the physician-patient relationship.

The Superior Courts' orders sustaining the demurrers and dismissing Appellant's Complaint should be reversed. The consequences of such a ruling need to be feared only by that small minority of physician-researchers and their commercial partners who view the applicable ethical guidelines and legal standards governing human research merely as impediments to personal profit.

II. REPLIES TO RESPONDENTS' ARGUMENTS.

A. RESPONDENTS' ATTEMPTS TO ALTER OR DISTORT IMPORTANT FACTUAL ALLEGATIONS OF THE COMPLAINT ARE IMPROPER AND SHOULD BE DISREGARDED AS SELF-SERVING AND MISLEADING.

Because these appeals arise from the trial courts' sustaining of demurrers to the Complaint, the issue on appeal is whether the Plaintiff has stated, or could state, a cause of action under any possible legal theory. For such purposes, all material facts pleaded in the Third Amended Complaint, and those which arise by reasonable implication, must be deemed true. (*Pollack v. Lytle* [1981] 120 Cal.App.3d 931, 936 no. 2).

The Respondents have apparently chosen to ignore this well-settled rule. Unable to argue that the facts presented totally fail to entitle the Plaintiff to any relief, Respondents have elected instead to misinterpret, modify,

distort and even alter many of the principal factual allegations contained in Plaintiff's Third Amended Complaint. Furthermore, they have distributed these efforts to mislead the court over five separate Respondent Briefs totaling 155 pages, in the mistaken hope that repetition of the extraneous (but unproven) "facts" they have substituted for the allegations of the Complaint will somehow make them "true" for purposes of appellate review.

Appellant's Opening Brief has already presented to this court a summary of the salient facts alleged in this case, along with specific line references to the text of the actual Third Amended Complaint (CTR 707-759; Appellant's Opening Brief ["AOB"] pp. 5-16). To avoid repetition and conserve the court's time, Plaintiff does not intend to respond to each and every misstatement or alteration of Plaintiff's allegations found in each of the five Respondent Briefs. Nevertheless, Appellant is mindful that the sheer volume of Respondents' mischaracterizations of Plaintiff's allegations and the record in this case may have the effect of diverting attention from the actual facts pleaded, which must be taken as true for purposes of this appeal. Therefore, what follows is an attempt to summarize, with specific line references to the Complaint, the key facts which support Plaintiff-Appellant's principal causes of action, but have been distorted in Respondents' briefs.

1. The Valuable Characteristics of Plaintiff's Cells Are Inherent, and Not the Product of Respondents' "Invention".

Plaintiff's blood cells are unique and produce substances important in the regulation of the human immune

system and do so in a manner which makes them scientifically and commercially valuable, both as a prolific natural source for those substances, and as a unique basis for artificially producing those substances in commercially useful quantities (CTR 707:25-28, 708:1-19; 722:27-28, 723:1-22; 724:2-28, 725:1).

Plaintiff's cells exhibit these unique properties naturally without the need for scientific manipulation or alteration, and continue to do so in the laboratory when actual specimens of Plaintiff's blood or tissues are cultured or grown (CTR 715:2-16; 739:26-28, 740:1-20). They are living, valuable, and unique human blood cells, and *not*, contrary to the repeated misleading assertions made by the Respondents, "diseased", "malignant", or an "unanticipated medical advancement" or "invention" created from "knowledge gained" from Defendants' "scientific investigation of diseased spleen tissue."

2. Prior to Examining Plaintiff, Respondents Were Aware That Cells With the Characteristics of Plaintiff's Cells Would Be Valuable.

At the time Plaintiff first visited the medical facilities of Defendants The Regents and Golde to confirm a blood disorder diagnosis, those Defendants, because of their expertise and familiarity with blood cells and the immune system, *were aware* that certain blood products and components would be of great value in a number of commercial and scientific efforts, and that access to a patient whose cells possessed certain unique properties would provide them with a continuous natural source of

those cells as well as commercial and scientific competitive advantages (CTR 711:4-19).

3. Respondents Arranged to Retain Quantities of and Perform Separate Non-Therapeutic Research on Plaintiff's Cells Prior to the Splenectomy.

After examining Plaintiff and confirming the diagnosis, Defendants recommended surgical removal of Plaintiff's spleen (CTR 711:24-28, 712:1-5). *Prior to Plaintiff's operation,* Defendants made arrangements to retain and grow in a separate laboratory blood cells present in the spleen tissue removed from Plaintiff so that they could be studied and used in connection with research activities which were unrelated to Plaintiff's medical care (CTR 712:6-27; 713:9-21). This executed Defendants' intention and desire to have regular access to and possession of Plaintiff's cells and their products (CTR 712:6-13).

4. Plaintiff Was Not Aware of, and Gave No Consent to, Non-Therapeutic or Commercial Research Prior to the Splenectomy.

Plaintiff was *never informed* by the Defendants of their interest in his blood cells and tissues for these separate research activities, nor was he ever informed of their intention to grow samples of his tissues and cells in a manner totally unrelated to his medical care (CTR 712:6-9, 14-27; 713:15-21, 23-26). The *only* consent obtained from Plaintiff prior to his splenectomy was a standard surgical consent form authorizing the removal of his spleen. At no time was any other use of his tissues,

nor any research or commercial activities using his cells, ever mentioned to, or discussed with Plaintiff, nor was any consent to such use obtained from Plaintiff by the Defendants (CTR 714:2-10), nor did he have any independent means of discovering those facts or plans (CTR 714:11-18; 715:27-28, 716:1-5).

5. Respondents' Separate Commercial Research Activities on Plaintiff's Cells Were Totally Unrelated to His Medical Care.

Plaintiff, who had not been advised of or asked to consent to the separate research use of his blood and tissues, signed the standard surgical consent form for the splenectomy based on representations by the Defendants that the operation was necessary for his health (CTR 714:19-22). None of the tissue samples retained and grown by the Defendants in connection with their separate research activities was ever utilized in any way in connection with Plaintiff's medical care (CTR 715:17-26).

6. 'Information on Respondents' Concealed Commercial Research Activities Would Have Been Material to Plaintiff's Consent.

Had Plaintiff been told of those activities, he would have insisted on participating in the decisions regarding the availability and use of his cells "in order to ensure that their valuable characteristics would be properly protected and preserved and made available to other research facilities and entities expert in such matters", *rather than permit Defendants to monopolize and control those*

cells solely for their personal research, commercial, and financial benefit (CTR 716:13-25). Had Plaintiff been informed of the potential value of his cells, both in terms of research and commercial development, he would have considered seeking care at other institutions where his wishes regarding their use and distribution would be respected and carried out in this regard, and would have considered seeking a proportionate financial share for his unique contribution to those commercial activities (CTR 716:26-28, 717:1-15).

Thus, the ruling of the lower court in sustaining the demurrers that Plaintiff *failed to allege* that, when he first went to U.C.L.A., he did not know or have reason to know research might be performed on tissue removed during his care, is not supported by a close reading of the facts of the Complaint or their reasonable implications. Even less supportable are Respondents' arguments that there are no allegations that research occurred in the context of Plaintiff's medical treatment, and that Plaintiff was "aware and expressly, as well as tacitly, consented to the University's separate scientific study" (as asserted, for example, in Respondent The Regents' Brief, at pp. 4-5).

7. The Focus of This Case Is a Seven-Year Physician-Patient Relationship, *Not* Just a Single Operation.

While the Respondents have gone to extraordinary lengths to argue that the only event involved in this case is the removal of Plaintiff's spleen, the fact is that Plaintiff's operation was only the beginning of a seven-year

physician-patient relationship with Defendants The Regents, Golde and Quan, during which time Defendants continued to periodically obtain large amounts of Plaintiff's blood on at least twelve separate occasions (CTR 717:16-28, 718:1).

Plaintiff was informed by the Defendants that these blood withdrawals were necessary for his medical care (CTR 718:2-9), and that they could only be performed by the Defendants at their facilities in Los Angeles, thereby directing the Plaintiff to travel from out of state on each occasion to enable them to obtain his blood (CTR 718:10-18).

The Plaintiff received no further medical or surgical treatment from Defendants other than check-ups and tests. Whether or not Plaintiff's "life was saved" by these medical actions by the Defendants, as they repeatedly proclaim in their briefs, is a matter of irrelevant speculation subject to subsequent medical proof, and in any event is nowhere alleged in the Complaint.

8. The Semiannual Blood Samples Taken Throughout This Seven-Year Period Were Important to Respondents' Commercial Efforts.

The blood withdrawals performed during these visits provided the Defendants with additional supplies of Plaintiff's cells which they cultivated and grew in connection with their independent research and commercial activities unrelated to Plaintiff's medical care (CTR 719:2-17). No informed consent, either oral or written, was ever offered to or solicited, let alone obtained, from

Plaintiff by any of the Defendants on any of these occasions until the second-to-last visit, which was almost seven years, and at least nine separate visits for blood withdrawals, later (CTR 718:19-28, 719:1; 719:18-28, 720:1; 731:14-20).

Respondents' desperate attempts to divert attention away from their activities throughout this seven-year period are misleading but understandable in light of the fact that it was during this period that they, while engaged in a continuing physician-patient and fiduciary relationship with the Plaintiff, clandestinely undertook to assess and exploit the commercial potential of Plaintiff's cells and their products, apply for a patent on those cells, enter into lucrative financial arrangements for the exclusive control and commercial development of those cells, and received present and future cash payments in return for access to those cells.

9. The Seven-Year Physician-Patient Relationship Coincided With Intensive Commercial Development of Plaintiff's Cells.

The Third Amended Complaint describes in detail at least twenty-five separate transactions or developments which occurred during this period which would have been relevant to Plaintiff (or any reasonable patient) with regard to his continued relationship with the Defendants (CTR 722-731). Despite the fact that the periodic blood withdrawals played an important role in these ongoing commercial activities, and despite the fact that the Defendants knew they were in a relationship of trust and confidence with their patient, they never disclosed to

Plaintiff, and actively concealed from him, all of these commercial activities which they were pursuing for their own personal economic advantage (CTR 720-722).

The events and activities concealed from the Plaintiff during the seven-year physician-patient relationship with the Defendants from 1976 to 1983 contradict Respondents' contention that their "academic" and "intellectual curiosity" was merely " stimulated" by the "study" of Plaintiff's "diseased spleen", prompting them to altruistically "create" or "invent" a "medical advancement" for the benefit of all mankind:

(a) The acquisition and growth of the valuable cells immediately following the Plaintiff's operation in 1976 (CTR 715:2-16);

(b) The investigation of the cells' unique properties immediately thereafter;

(c) Defendants' formal characterization of the cells as a commercially valuable and patentable phenomenon as early as May, 1979 (CTR 722:4-28, 723:1-28, 724:1);

(d) The written description by Defendant Golde of the cells as "unique" and the "only human cell line" producing lymphokines of "considerable value as reagents and ultimately as therapeutic products" in August, 1979 (CTR 724:2-15);

(e) The Defendants' preparation of a University "abstract of invention" describing the cells, their products and their commercial utility soon thereafter (CTR 724:16-28, 725:1);

(f) The initiation by the Defendants of negotiations with private for-profit biotechnology firms regarding the commercial development of the cells commencing in February, 1980 (CTR 725:2-9);

(g) The execution of a formal agreement with a biotechnology firm for commercial development of the cell line on April 23, 1980 (CTR 725:10-17);

(h) The concurrent involvement of Defendants The Regents and Golde in a federal lawsuit concerning the ownership rights to another cell line derived from a patient commencing on September 11, 1980 (CTR 725:18-28, 726:1-12);

(i) The formal application for a patent on the cell line by Defendants The Regents, Golde and Quan on January 30, 1981 (CTR 726:13-21);

(j) The initiation of negotiations between Defendants The Regents, Golde and Genetics Institute regarding exclusive access to and commercial development of Plaintiff's cells and cell products in late 1980 and early 1981 (CTR 726:26-28, 727:1-17);

(k) The execution, as a result of these negotiations, of separate stock option agreement enabling Defendant Golde to obtain 75,000 shares of Defendant Genetics Institute in exchange for his services in ensuring exclusive and continued access to Plaintiff's cells and products in early 1981, said shares being sold to Defendant Golde for a penny a share (and having a current market value of approximately $1,650,000 according to the NASDAQ listing in the *Wall Street Journal* dated March 24, 1988) (CTR 727:18-28);

(l) The execution on May 26, 1981 of a commercial contract between Defendants Golde, The Regents and Genetics Institute for the commercial development of the cell line, providing exclusive access to the cells and their products to the parties to the contract in exchange for the payment of $330,000 to Defendant The Regents (CTR 728:1-13);

(m) The search for and location of a multinational pharmaceutical firm (Defendant Sandoz Ltd.), which was added to the exclusive access and commercial development agreement extending its terms on June 4, 1982, and providing an additional $110,000 in payments to Defendants The Regents and Golde (CTR 728:21-28, 729:1-4); and

(n) The renewed application for a patent on the cell line and products filed by Defendants The Regents, Golde and Quan on January 6, 1983 (729:5-12).

10. Plaintiff Was Never Informed of the Non-Therapeutic Commercial Utilization of These Semiannual Blood Withdrawals.

Despite the fact that the Defendants obtained approximately one dozen blood withdrawals on a roughly semiannual basis during the very time that all of these activities were taking place, and the fact that the blood withdrawn on those occasions was necessary for and utilized in these commercial development activities, and was not used to improve Plaintiff's health or medical care (CTR 719:2-17), the Defendants never disclosed, and in fact actively concealed, the existence of these activities and the money involved.

In this manner, to protect their own financial interests, they totally excluded Plaintiff from any participation in the control, disposition, or proceeds of his own cells and their products. In fact, on those occasions on which Plaintiff questioned the Defendants regarding the necessity for the large blood withdrawals or their having to be taken only at U.C.L.A., Defendants affirmatively represented to Plaintiff that any studies being performed on those samples was "strictly academic and purely scientific medical research" solely with regard to the causes and potential cures of his blood disorder in the hopes of benefiting the health of Plaintiff (CTR 719:18-28, 720:1). When asked by the Plaintiff if there was any possible commercial value in the activities involving Plaintiff's blood samples, the Defendants repeatedly and affirmatively represented to him that there was no commercial value to his blood or cells, and that they had discovered nothing of commercial or financial value in his blood. In fact, the Defendants "actively discouraged such inquiries." (CTR 720:2-15).

In light of these facts, thoroughly detailed in the Third Amended Complaint, Respondents' assertion that Plaintiff somehow "consented" to the Defendants' use of his blood and cells for these concealed activities cannot be supported. The information withheld or misrepresented about the commercial exploitation of his cells would have been highly relevant, if not determinative, in Plaintiff's decisions concerning whether or not to continue to participate in those activities, and what the nature and circumstances of that participation would be (CTR 716:13-28, 717:1-15; 732:12-18; 734:11-17).

11. Respondents' Consent Forms Offered to Plaintiff In 1983 Admitted His Rights In His Cell Line and Products.

It was only after almost seven years and nearly a dozen blood withdrawals that the Defendants first presented Plaintiff with a complex form, in scientific jargon, seeking his consent to research activities limited to the blood samples withdrawn on April 11, 1983 (CTR 731:14-20; 732:24-28, 733:1-7). A copy of the form involved was attached and incorporated as Exhibit A to Plaintiff's Third Amended Complaint (CTR 758-759). (The undisputed presence of this consent form in the Clerk's Transcript makes moot the lower court's objection that it was not included in the Complaint [CTR 983]).

Any "consent" obtained by the use of the form on April 11, 1983 was clearly uninformed and invalid due to Defendants' concealment from Plaintiff of information material to his decision, and his total lack of independent knowledge to understand the meaning of the technical terms and concepts involved (CTR 731:21-28, 732:1-18).

The same form was again presented to and signed by Plaintiff on the September 20, 1983 visit (Exhibit A to the Complaint, CTR 758-759; 732:24-28, 733:1-7). This Exhibit clearly demonstrates that Plaintiff gave his unambiguous, written indication that he *did not* "voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood" withdrawn from Plaintiff on that date (CTR 758).

This document, which Respondents conveniently ignore in their versions of the facts of this case, is remarkable for three reasons:

First, the language of the form prepared by Defendants The Regents and signed by Defendant Golde (CTR 759), recognizes and asks for the waiver of the patient-subject's *rights* to a cell line or products developed from his blood, *the very right which is at the center of this case and which the Respondents now disingenuously contend is invalid and nonexistent.*

Second, because the Defendants' research was funded at least in part by federal government research grants, the form's use of exculpatory language waiving or appearing to waive any of the patient's rights is absolutely prohibited by federal regulations concerning consent to federally funded human research (45 CFR § 46-116 [1982] *promulgated in* 46 Fed. Reg. 8366, 8386-9 [1981]; see also AOB at 41-48).

Third, and perhaps most revealing, despite Plaintiff's clearly written indication that he elected *not* to waive his rights to his cell line and products, the Defendants nevertheless continued their commercial exploitation activities *using blood withdrawn from Plaintiff on that date* (CTR 734:1-10).

The sudden presentation of this consent form to Plaintiff for the first time in 1983, after nearly seven years of periodic blood withdrawals identical in nature and purpose, and equally subject to regulatory and common law requirements for fully informed consent, is easily explained by the reasonable inference that the progress of their clandestine commercial activities by the date caused

the Defendants to be especially concerned about protecting their personal financial interest in their commercial project. Just before and during early 1983, the Defendants' collaborative agreement between The Regents, Golde, Genetics Institute and Sandoz had been in existence for over two years, the renewed patent application on the cells had just been filed, the prospects for developing a profitable product were solidifying, and the patent on the cell line was about to be issued just a few months later in March, 1984.

Defendants' sudden interest in some form of "consent" or "waiver" of Plaintiff's admitted rights to the cell line and its products, however, was unfortunately not accompanied by an equally keen interest in disclosing to the patient the unique properties of his cells, Defendants' commercial activities in exploiting those properties, and the their [sic] financial interests in that exploitation.

12. Respondents Can Offer No Explanation For Their Failure to Inform Plaintiff of Their Commercial Activities Using His Unique Cells Other Than to Protect Their Economic Self-Interest.

The Respondents' briefs devote much prose to the "societal duty" of universities, researches and biotechnology firms to pursue "intellectual curiosity" and "medical advancement", but the question remains: *why were the Defendants so unwilling to share the good news that they had developed a useful and potentially immensely profitable therapeutic product with the very patient who was the sole source of the critical cells?* The only answer that can be reasonably inferred from the facts set forth in the Complaint is that

the Defendants recognized that the Plaintiff would have some claim to his contributive share, whether due to the recognition of an interest, or in the form of damages for their breach of fiduciary duty or fraud, or due to their violations of applicable human subject informed consent requirements.

Because their dishonest attempt to obtain some form of waiver from the Plaintiff failed, and now that the true nature of the commercial activities concealed from the Plaintiff during his medical care are known, the Respondents can only resort to denying *any* rights of the patient in such circumstances, and to instead argue that once adequate medical care is rendered, physicians, researchers, and their commercial collaborators have unlimited license to commercially exploit their uninformed patients.

If Respondents contend that the facts set forth in the Third Amended Complaint are incorrect, their proper recourse is through the development of competent and admissible evidence introduced in support of motions for summary judgment or dismissal. They are not entitled to attempt to introduce in their Respondent Briefs extraneous, unproven facts not pled in Plaintiff's Complaint in an attempt to distort the basis for Plaintiff's causes of action.

B. RESPONDENTS' ATTEMPTS TO MANIPULATE AND DISTORT THE FINDINGS AND RULINGS OF THE LOWER COURT SHOULD BE DISREGARDED IN FAVOR OF THE ACTUAL MINUTE ORDERS AND HEARING TRANSCRIPTS AT ISSUE IN THIS APPEAL.

Just as the Respondents have attempted to "rewrite" the facts set forth in Plaintiff's Third Amended

Complaint, they have also gone to extraordinary lengths to recast the findings and rulings of the lower court in an effort to distort the issues on appeal.

One example of this technique is Respondent Golde's strained attempt to argue that Plaintiff's election to not amend the Third Amended Complaint and seek appellate review of the various causes of action had the effect of some form of "abandonment" or "voluntary dismissal" of any causes of action arising out of the facts taking place after Plaintiff's splenectomy (Respondent Golde's Brief, pp. 7-13). This assertion is easily refuted by a careful reading of the plain language of the court's minute orders, the procedural history of this case, and the hearing transcripts.

1. The Superior Court's Demurrer Rulings Did Not Constitute a Wholesale Rejection of Each Cause of Action Alleged.

Respondents would have this court believe that the rulings of the lower court somehow constituted a wholesale adoption of all of the positions asserted in their Demurrers and their Respondent Briefs. Nothing could be further from the truth. In point of fact, the demurrers of Respondents The Regents, Golde and Quan to Plaintiff's Third Amended Complaint were sustained only as to the "first cause of action, and to the extent it (the first cause of action) is incorporated in all of the remaining causes of action . . . " (CTR 982). The court specifically stated that it was "unable to rule on all demurrers to all of the causes of action," and specifically ordered "all other demurrers off calendar without prejudice." (CTR 982-983).

Because the lengthy and specific factual allegations of the Complaint were set forth in the text of the first cause of action for conversion, the court focused its attention on the conversion cause of action *only*, and enumerated what it felt were certain defects in that cause of action. At no point was it ever suggested by the court, either in its minute order or during the hearing, that it had specifically considered and sustained each and ever general demurrer to the remaining twelve separate causes of action set forth in the Complaint.

The deficiencies found by the court in the conversion cause of action were listed in the minute order. One defect was Plaintiff's supposed failure to allege "that when he first went to U.C.L.A. he did not know or have reason to know that tissue removed during the care and treatment of patients by that facility might be used for medical or scientific study as well as for diagnosis and treatment of the patient." (CTR 982). As stated in Appellants' Opening Brief and *supra* in this Reply Brief, it is Appellant's position that such allegations *were* contained in the Complaint, that in any event there is no "implied consent" under any circumstances to human research, and the "purely academic and scientific" activities disclosed on a limited basis to Plaintiff could not have provided him a basis for a truly informed consent to commercial exploitation of his blood cells.

Judge Deering further found the conversion cause of action deficient for its supposed failure to allege that the Defendants knew of the potential commercial value of his blood and intended to exploit that value prior to its removal from the Plaintiff (CTR 982). As set forth in Appellant's Opening Brief and this Reply Brief, it is

Appellant's response that it was clearly alleged that Defendants' expertise put them in the position to recognize the value such cells would have and how beneficial it would be to have a continuous, living human source of such cells (CTR 711:4-19).

Nevertheless, since the court's objection was in the context of the sufficiency of a *conversion* cause of action, it is also Appellant's position that prior wrongful intent, or indeed any state of mind, is *not* a required element of the tort of conversion under well-established California law (AOB at pp. 22-25).

Judge Deering also identified as a deficiency Plaintiff's supposed failure to allege whether he consented to the splenectomy for therapeutic purposes, or that the splenectomy was *totally unrelated* to any therapeutic purpose (CTR 983). As set forth in Appellant's Opening Brief and in this Reply Brief, it is Appellant's position that consent to medically indicated surgical intervention does not constitute to consent to human research or commercial exploitation of a patient's cells. There are also numerous facts pled in the Complaint that various tissue and blood withdrawals described were totally unrelated to Plaintiff's medical care. Furthermore, it is also Plaintiff's position that the duty to disclose is not limited to physical risks under *Bowman v. McPheeters* (1947) 72 Cal.App.2d 795, and that failure to disclose a non-therapeutic purpose known to the physician but unknown to the patient when obtaining a consent for a therapeutic procedure vitiates that consent under the holding and rationale of *Rains v. Superior Court* (1984) 150 Cal.App.3d 933 (see discussion at AOB, pp. 33-41).

Because of the confusion resulting from a minute order which on the one hand stated that the court was unable to rule on all demurrers to all causes of action in the Complaint, and in fact ordered all other demurrers off calendar, but on the other hand sustained a demurrer to one cause of action, and "because the first 62 paragraphs are incorporated in all of the remaining causes of action" also sustained a demurrer to the first cause of action "and to the extent that it is incorporated in all of the remaining causes of action" (CTR 982), Plaintiff filed a Motion for Clarification or, in the Alternative for Reconsideration of the court's ruling (CTR 987-1001).

The resulting minute order stated that since the demurrer to the first cause of action was sustained on certain grounds, and "was incorporated into the remaining causes of action, those causes of action were defective for the same reasons." (CTR 1035). Consequently, the court ruled that it was sustaining the demurrers to the remaining causes of action "on that limited basis."

Given the clear language of these minute orders and the procedural history outlined here, it is impossible to fathom the logic of Respondent Golde in interpreting these rulings to mean that Plaintiff somehow "voluntarily dismissed" all causes of action that may have arisen out of activities subsequent to Plaintiff's splenectomy (or even out of those activities prior to and during Plaintiff's splenectomy) by electing not to amend in order to seek this appeal. As stated herein, Plaintiff's position was that either the allegations requested by the court were already in the Complaint, or the legal basis on which the court required additional allegations was incorrect.

Even the court expressed uncertainty concerning the procedural ramifications of its approach, and, more importantly, whether the court really intended its ruling to have the effect of sustaining demurrers to each of the thirteen causes of action presented. During the hearing on the general demurrers to the Third Amended Complaint of Defendants The Regents, Golde and Quan, the court stated:

> "THE COURT: It's difficult for the court to rule on a part of a cause of action. There are certain allegations in the first 62 paragraphs which I feel do not allege a cause of action as to those events. Those allegations as well as other actionable allegations are incorporated into each of the causes of action. I could have searched each cause of action to see if any cause of action on any theory was stated. And notwithstanding the (sic), what believe to be deficiencies in certain allegations, I could rule on the demurrer. I thought it might be preferable to take another route, namely, to try and get all of the allegations in my opinion properly set forth before I ruled on any of the demurrers.
>
> Do you follow what I'm saying?
>
> (intervening colloquy)
>
> THE COURT again: But what I – let me make this observation.
>
> Procedurally on a demurrer the court is not concerned whether some part of a cause of action is defective unless there is a special demurrer or motion to strike. If a cause of action or a count states a cause of action in part, because part of it is proper *then the court should overrule the demurrer. Technically that's what the court should do in this case.* Examine each of the causes of action to see if any cause of action is

> stated on any ground for any period of time from 1976 up to 1983. Certain of the demurrers are relevant to the early stages of this transaction, 1976. I thought perhaps it would be better to take another route and to point out what I thought were the deficient parts of the various counts and see if the Plaintiff wanted to amend. *It is not the best route if the Plaintiff doesn't want to amend.*"

(RTR 75-77) (emphasis added)

2. The Superior Court Indicated Agreement With Appellant's Central Contention That Nonconsensual Commercial Exploitation Is Not Privileged.

Other excerpts from the hearing transcripts confirm that the court's ruling did not reflect an absolute rejection of Plaintiff's central theories. For example, the court expressed recognition of the important distinction between a patient's unique cells and their products on the one hand, and the general advancement of medical knowledge obtained from treating a patient on the other. The court made the following statements during a discussion of these issues with counsel for Respondent The Regents:

> "MR. WAGNER (counsel for Respondent The Regents): . . . It is because of that limitation that Mr. Gage argues that what we are directing ourselves at is the cell-line of Mr. Moore. It's not the cell-line of Mr. Moore, it is the advancement that the University brought about that the University asserts a property interest in.
>
> THE COURT: *Well, if I agreed with you then I would sustain the demurrer. But I am not at all*

satisfied at this point in time that the commercial use of bodily tissue removed for care and treatment is privileged or consented to."

(RTR 72) (emphasis added)

The distinction drawn by the court was not altered by Respondents' argument that somehow research would be adversely affected if commercial exploitation of patient materials was not rewarded with profit:

"MR. WAGNER: If Your Honor were to consider the effect of it, I mean the possible results they would come about by expanding patients' interests into the incidental or independent research that gets conducted there –

THE COURT: *I am talking about living tissue being used to produce living tissue out of it. And the commercial use of that tissue. I am not speaking of knowledge gained from examining or experimenting on the tissue* itself or developing toxins or antitoxins. I am talking about the dupli (sic) – having bodily tissue reproduce itself, so to speak, into more bodily tissue of the same kind. Whether it be cells or otherwise.

MR. WAGNER: I understand, Your Honor.

THE COURT: *And I am concerned that a patient who goes into a health facility and has a substance removed from his body for care and treatment and diagnosis, and is not told at the time that that substance is also going to be used for commercial purposes, I am not at all satisfied at this time that the institution can do that. Without informing him. . . .*

. . . As I understand the Complaint in this case, rightly or wrongly, correctly or incorrectly, the Plaintiff is alleging that blood and tissue were removed from his body and it was used to

> reproduce similar tissue or some other live tissue which was commercially valuable and which was commercially handled. And he further alleges that he was not informed of the value of the tissue in a commercial sense, nor was he informed that it would be commercially used. . . .
>
> . . . All I am saying to you is repeating myself, but I believe that there may be situations, which is apparently alleged in this Complaint, that *tissue was used to reproduce additional tissue which was commercially valuable and these facts were not disclosed to the Plaintiff.*"

(RTR 72-74) (emphasis added)

With regard to the "requirement' reflected in the ruling that there must be a total absence of therapeutic purpose for a medical contact to be actionable in this context, it should be pointed out that the reasonable inference from the facts of this case is that some of the blood and tissue withdrawals produced quantities of specimens that were partially used for patient monitoring, and partially used for the ongoing commercial development of Plaintiff's cells. During the hearing on the demurrers of Respondents The Regents, Golde and Quan to Plaintiff's Second Amended Complaint, the court pointed out, and counsel for Respondent The Regents agreed, that such withdrawals of specimens for research or commercial purposes, obtained simultaneously with but beyond those absolutely necessary for medical treatment, would be actionable:

> "THE COURT: You don't deny – and I'm not saying this is a fact or isn't a fact – that *if a Defendant withdrew more blood than was needed for his care and treatment for the purpose of commercial*

utilization of that blood in some way, that that was done without the patient's consent, would be actionable.

MR. WAGNER (Counsel for Respondent The Regents): *That would be actionable,* as I understand it Your Honor, under the California Experimental Act. . . .

THE COURT: Well, as I understand the purpose underlying the Research Act, it is that if it is intended at the outset of the treatment or diagnosis of the patient that it is going to be wholly or in part experimental or research, then procedures must be complied with.

If, on the other hand, the sole intent of a surgical procedure or treatment is to treat the patient and not for experimental purposes, then the research law doesn't apply.

Am I correct?

MR. WAGNER: I would concur with that, Your Honor.

THE COURT: Okay. My question has to do with what I'll describe as, let's say, a routine medical treatment as distinguished from a research medical treatment. *A patient submits himself to the doctor for treatment and diagnosis during the course of which, from time to time, blood is withdrawn by the doctor for that purpose, for those purposes. At some point in time the doctor determines that this particular patient's blood or condition is useful for various laboratory studies and some endeavor they are undertaking of the research nature.*

So if he decided – he, the doctor, says, "Well, while I'm taking 5 ounces of blood, I might as well take ten more and I'll send it over there to this laboratory so they can pursue their own experiment," would that be invading any patient's right?

MR. WAGNER: (After some discussion) . . . But in this case I would suggest that if there's an extra withdrawal, *that extra withdrawal requires conformed* [sic] *consent for the research.*

THE COURT: *It is impermissible otherwise.*

MR. WAGNER: Subject to that statute.

THE COURT: Okay."

3. Respondents Genetics Institute and Sandoz Pharmaceuticals Corporation's Mischaracterizations of the Superior Court's Ruling Ignores the Fact That No Leave to Amend Was Granted to Plaintiff.

The argument of Respondent Sandoz Pharmaceuticals Corp. that Appellant has somehow "waived" any appellate challenge of the subsequent ruling of the superior court on the separate demurrers of itself and Respondent Genetics Institute is not supported by a close reading of the minute order involved and Appellate's [sic] Opening Brief. Appellant clearly stated in his opening brief that Appellant is seeking review and reversal of all of the rulings of the superior court in dismissing Plaintiff's Third Amended Complaint following the sustaining of Respondents' demurrers (AOB, pp. 1-4, 75).

Furthermore, Respondent Sandoz Pharmaceuticals Corp.'s contention that the judgments of dismissal in favor of itself and Respondent Genetics Institute, Inc. should be affirmed based on the holding of *Gonzalez v. State of California* ([1977] 68 Cal.App.3d 621, 635) is without merit because it relies on yet another attempt to mischaracterize the actual rulings of the trial court. As clearly stated in the minute order of Judge Cole (CTGS

801-803), the demurrers of Respondents Sandoz Pharmaceuticals Corp. and Genetics Institute were sustained *without leave to amend,* with the court specifically stating: "Normally the court would consider granting leave to amend; *it does not do so here* since there already is an appeal pending that may resolve the central issues." (Referring to the previously filed notice of appeal with respect to Respondents The Regents, Golde and Quan) (CTGS 802) (emphhasis [sic] added).

The holding of *Gonzalez,* as is made clear by the language of the case quoted in the Brief of Respondent Sandoz Pharmaceuticals Corp., applies only "when a plaintiff is given the opportunity to amend his complaint and elects not to do so". By contrast, where the court sustains demurrers *without* leave to amend, plaintiff obviously has no option to elect to decline to amend, and it cannot be presumed that the plaintiff has stated as strong a case as he can.

This is especially relevant to the consideration of the arguments of Respondents Sandoz Pharmaceuticals Corp. and Genetics Institute with regard to what they contend is the "vagueness" and "lack of specificity" of the Complaint with regard to each of them individually. It is Appellant's position that adequate allegations of wrongful acts attributable to these Respondents have been made in the complaint, as well as sufficient allegations to support imposition of liability for the prior wrongful acts of their commercial collaborators due to their aiding and abetting them in breaching their fiduciary duties to Plaintiff, and their ratification of prior acts and acceptance of the proceeds of those breaches of duty and conversion. However, Appellant wishes to remind this court that he

was not given an opportunity to remedy with greater specificity this purported deficiency in his Complaint due to the court's failure to grant leave to amend and the resultant suspension of discovery.

Appellant would also remind this court that with regard to Defendant Sandoz, Ltd., the multinational pharmaceutical firm based in Switzerland which entered into the collaborative commercial agreement with the Respondents to develop and market the cell line and its products, Appellant has timely filed a separate Notice of Appeal of a superior court ruling granting that Defendant's motion to quash for lack of personal jurisdiction. Defendant Sandoz, Ltd. is the parent corporation and owner of its subsidiary, Respondent Sandoz Pharmaceuticals Corporation.

C. CONTRARY TO THE CONTENTIONS OF RESPONDENTS GENETICS INSTITUTE AND SANDOZ, FACTS CONSTITUTING THE NECESSARY ELEMENTS OF A CIVIL CONSPIRACY HAVE BEEN PLED.

The facts pled clearly demonstrate that the joint activities of the Respondents, pursuant to commercial agreements, and as part of their common plan to commercially develop and exploit Plaintiff's cell line, constituted a civil conspiracy subjecting each of them to liability for the wrongful acts committed against Plaintiff in furtherance of their concerted efforts. It is well-settled that "joint liability does attach if a joint project to do a wrongful act is carried out and damage has resulted." (*Weatherton v. Growers Farm Labor Association* [1969] 275

Cal.App.2d 168, 175, citing 2 Witkin, *Summary of California Law*, Torts, §15).

The California Supreme Court has held that:

> "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually commit the tort themselves."

(*Wyatt v. Union Mortgage Company* [1979] 25 Cal.3d 773, 784, citing *Unruh v. Truck Insurance Exchange* [1972] 7 Cal.3d 616, 631).

The Supreme Court in *Wyatt* also held that the effect of alleging conspiratorial conduct is to implicate all parties who "agree to the plan to commit the wrong as well as those who actually carry it out." (*Id.*, at 784, quoting *Black v. Sullivan* [1975] 48 Cal.App.3d 557, 566). As a result, a plaintiff is entitled to damages from those defendants who "concurred in a tortious scheme with knowledge of its unlawful purpose." (*Id.*, at 784).

The Supreme Court also pointed out that the required concurrence and knowledge of the civil co-conspirators *can be established by inference from the nature of the acts done, the relationships between the parties, the interests of the conspirators, and other relevant circumstances.* (*Id.*, at 785, quoting *Chicago Title Ins. Co. v. Great Western Financial Corp.* [1968] 69 Cal.2d 305, 316).

Furthermore, the liability of a defendant for civil conspiracy *does not require that the defendant "joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act*

previously or subsequently done by any of the others in pursuance." (*DeVries v. Brumback* [1968] 53 Cal.2d 643, 648). (emphasis added)

The facts set forth in Plaintiff's Complaint clearly provide a sufficient basis for a cause of action for civil conspiracy. There is no requirement that the Plaintiff include in his Complaint a separate, enumerated cause of action explicitly alleging civil conspiracy. (*Michael R. v. Jeffrey B.* [1984] 158 Cal.App.3d 1059, 1069, citing 3 Witkin, *California Procedure* [2d Ed. 1971] Pleading, §773, p. 2839).

Certainly, Golde, The Regents, Genetics Institute, Sandoz Limited and Sandoz Pharmaceuticals Corporation agreed by written contract to perform joint activities to commercially develop and exploit Plaintiff's cell line without Plaintiff's knowledge or consent. Furthermore, the Defendants were aware that Defendants Golde and The Regents had obtained access to Plaintiff's blood cells through the creation and maintenance of a physician-patient relationship, with its inherent fiduciary duties of full disclosure (CTR 710:1-23). By accepting the competitive and financial benefits of Defendants Golde's and The Regents' breaches of their fiduciary duties to the Plaintiff, the Defendants joined the civil conspiracy and are thereby liable for every act previously or subsequently done by any of the other Defendants in pursuant of their joint commercial goals.

From the medical literature written by Defendant Golde and his colleagues regarding Plaintiff's cell line (CTR 722:4-18) as well as from the patent application filed by Defendants Golde, Quan, and The Regents on the cell

line (which was filed prior to the commercial agreements with Defendants Genetics Institute and Sandoz) (CTR 726:13-21; 344, col. 2, lines 45-47), Defendants Genetics Institute and Sandoz knew or should have known that the source of the cell line which was the object of their commercial efforts had been obtained by Defendants Golde and The Regents through their access to Plaintiff's blood and bodily substances due to their physician-patient relationship with him. These Defendants also knew or should have known that Defendant Golde and Defendant The Regents had not informed the Plaintiff of any aspect of these commercial activities nor of the value of his cells.

D. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH ALLEGATIONS CONSTITUTING THE NECESSARY ELEMENTS OF AN AGENCY OR JOINT VENTURE RELATIONSHIP AMONG DEFENDANTS.

Plaintiff's Third Amended Complaint clearly sets forth facts which support a characterization of the relationships and activities among the Defendants in this case as agency, joint venture/enterprise and/or ratification among the Defendants. The Complaint clearly alleges the creation of written, formal commercial agreements and financial arrangements which were entered into by the Defendants in furtherance of their joint goal of developing and commercializing products derived from Plaintiff's unique blood and bodily substances.

As a result, the relationship among these Defendants can be described as either an agency or a joint venture/

enterprise causing vicarious liability or the imputation of the acts of one to each of the other Defendants.

By agreeing to pay Defendants Golde and The Regents specified sums of money for both their continued activities utilizing Plaintiff's blood and bodily substances and for exclusive access to those substances themselves and the research performed upon them, and by hiring Defendant Golde as a paid consultant, Defendants Sandoz and Genetics Institute created what could best be described as a principal-agent relationship with Defendants Golde and The Regents. Therefore, they became vicariously liable for those acts and omissions committed by Defendants Golde and The Regents within the scope of the agency. Civil Code § 2338 provides that:

> "[A] principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business . . . "

Because Defendant Golde needed to have and maintain a physician-patient relationship with Plaintiff throughout the period described in the Complaint in order to continue to have access to Plaintiff's blood and bodily substances, and since those blood and bodily substances were essential to the commercial and research activities specified in the contracts among the parties, it is clear that Defendant Golde's actions, concealments, representations and misrepresentations were clearly negligent or intentional acts committed by Defendant Golde in and as a part of the "transaction" of these commercial plans. Golde's conduct was clearly in furtherance of the business of the agency and therefore, as their agent, his

liability can be imputed vicariously to his principals, including Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation.

Another characterization of the relationship among the Defendants, which also leads to the imputation of liability for wrongful acts to each of the other Defendants, is that of joint enterprise. A joint enterprise or venture:

> "is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of anyone within the scope of the enterprise is to be charged vicariously against the rest."

W. Keeton, *Prosser and Keeton on the Law of Torts* (1984) § 72, at 516-517.

The existence of such an enterprise *is usually a question for the jury, and as such is an issue of fact, not an issue of law to be determined on the pleadings or by demurrer.* (*Id.*). Therefore, even if it is argued that the relationship among these Defendants does not fit squarely within the definition of a principal-agent relationship, it is still clear that the written contracts in existence among these Defendants clearly created a joint venture which would make each participant vicariously liable for wrongful acts carried out by other participants in furtherance of that joint venture. The activities of Defendants Golde, Quan, and The Regents in converting Plaintiff's blood and bodily

substances, failing to obtain informed consent from Plaintiff, breaching their fiduciary duty to Plaintiff, committing fraud and deceit upon Plaintiff, and unjustly enriching themselves thereby, are equally attributable to Defendants Genetics Institute and Sandoz Pharmaceuticals Corporation because those actions were committed as part of the joint venture among all the Defendants to commercially develop Plaintiff's cells.

E. CONTRARY TO RESPONDENTS' CONTENTIONS, PLAINTIFF'S COMPLAINT SETS FORTH FACTS SHOWING RATIFICATION OF THE WRONGFUL ACTS COMMITTED BY DEFENDANTS THE REGENTS, GOLDE, AND QUAN PRIOR TO THE EXECUTION OF THE WRITTEN COLLABORATIVE AGREEMENTS BY DEFENDANTS GENETICS INSTITUTE AND SANDOZ.

Respondents Genetics Institute and Sandoz Pharmaceuticals Corporation have argued that they cannot be held accountable for actions taken prior to their addition to the collaborative agreements between Defendants Golde, The Regents, and themselves regarding the commercial exploitation of Plaintiff's cells. Respondents' argument in this regard ignores the fact that their addition to those agreements operated as a ratification by them of the prior acts of the co-defendants in furtherance of their shared commercial activities. Civil Code § 2310 provides:

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where

> an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

Clearly, the written agreements specifically alleged in Paragraphs 41(o), (p), (q), and (r) of the Complaint (CTR 728, 729:1-4) demonstrate that the written collaborative agreements were in the same "manner" as would have been necessary to confer an original authority for the commercial development of the cell line extracted from Plaintiff by Defendants Golde and The Regents. Furthermore, Defendants Genetics Institute and Sandoz, by "accepting and retaining the benefit" of exclusive access to Plaintiff's blood and bodily substances, and the commercial advantages and profits flowing therefrom made possible by the wrongful acts of Defendants Golde and The Regents, and by retaining the benefits of those actions in furthering their own commercial activities, ratified and adopted those acts in furtherance of this scheme which preceded the execution of these written agreements.

F. RESPONDENTS THE REGENTS, GOLDE AND QUAN'S CLAIM OF IMMUNITY SHOULD BE REJECTED.

It has been repeatedly held in California that, in determining the applicability of immunities to a defendant's wrongdoings in a tort action, "when there is negligence, the rule is liability, immunity the exception." (*Muskopf v. Corning Hospital District* [1961] 55 Cal.2d 211, at 219). In accord with the principle, it has also been frequently held that "courts should not casually decree

governmental immunity." (*Johnson v. State* [1968] 69 Cal.2d 782, at 798).

In this regard, "the Government Tort Claims Act is to be construed accordingly" (*Meyer v. City of Oakland*, [1980] 107 Cal.App.3d 770, at 778) and "[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." (*Ramos v. County of Madera* [1971] 4 Cal.3d 685, at 692).

Respondent [sic] The Regents, Golde and Quan's claims of immunity on the grounds of public entity or public employee immunity erroneously misinterpret the statutory scheme set forth in Government Code §§815.2, 818.8 and 822.2, misconstrue the true meaning of Plaintiff's clear allegations and Causes of Action, and then misapply the law.

Government Code, §815.2 provides, in its entirety:

> "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> (b) Except as otherwise provided by statute a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

The effect of this section is to impose upon public entitles [sic] "vicarious liability for the tortious acts and

omissions of their employees." (*Senate Legislative Committee Comment, Government Code Section 815.2*). Because this section of the Code provides that in the absence of a statute a public entity cannot be held liable for an employee's act or omission where the employee himself would be immune, this statute must be applied in conjunction with a close reading of Government Code §§818.8 and 822.2 which deal with liability for "misrepresentations" by employees of public entities.

Government Code §818.8 provides, in its entirety, that:

> "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional."

Government Code §822.2 provides, in its entirety, that:

> "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, *unless* he is guilty of actual *fraud*, corruption or malice." (emphasis added)

In *Schonfeld v. City of Vallejo*, ([1975]) 50 Cal.App.3d 401), the Court of Appeal was confronted with an interpretation of the words "actual fraud, corruption or actual malice"in Government Code §822.2. The court saw "merit" in the City's contention that "actual fraud" in that statute "must be construed to mean 'fraud and malice' based on personal malevolence *or wrongful purpose.*" (*Schonfeld v. City of Vallejo, supra*, at 409). The court held that, in order to impose liability on a public employee,

something greater than common law deceit must be present, such as "actual malice" which the court defines as *"a conscious intent to deceive,* vex, annoy or harm the injured party in his business." (*Schonfeld* at 410). In so holding, the court, in a footnote, refers to Penal Code, § 7 which defines "malice", not exclusively as "a wish to vex, annoy or injure another person", but also and in the alternative as *"an intent to do a wrongful act."* (*Schonfeld,* footnote 9, at 410).

In asking this court to immunize these Respondents from the consequences of their wrongful acts as specifically set forth in Plaintiff's allegations, Respondents erroneously misinterpret this statutory scheme, and attempt to mislead this court concerning the true meaning of Plaintiff's clear allegations by asserting that all of Plaintiff's causes of action are dependent upon a finding of intentional or negligent misrepresentation, and that no cause of action for medical negligence has been alleged. Neither of these assertions is true, nor do they have any basis in the clear language of Plaintiff's Third Amended Complaint.

1. Eleven of Plaintiff's Thirteen Separate Causes of Action Do Not Involve Misrepresentation as a Necessary Element, and the Complaint Specifically Alleges Defendants' Conscious Intent to Deceive.

Under the Code section and case law summarized above, the only way that The Regents as a governmental entity would be immune from liability due to the acts of public employees Golde and Quan would be if Plaintiff's Complaint alleged simple common law deceit, and did

not allege Defendants' conscious intent to deceive. Furthermore, the only way in which public employees Golde and Quan could be immune from liability, due to their misrepresentations, would be if Plaintiff's Complaint did not allege that their misrepresentations were motivated by a conscious intent to deceive.

Contrary to Respondents' erroneous assertions, it is clear from Plaintiff's Third Amended Complaint that eleven of Plaintiff's thirteen causes of action do not require, as necessary elements, simple common law deceit or simple misrepresentation. As set forth in Appellant's Opening Brief and the Complaint, Plaintiff's causes of action for conversion, informed consent, breach of fiduciary duty, unjust enrichment, quasi-contract, bad faith breach of the implied covenant of good faith and fair dealing, intentional infliction of emotion distress, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief *do not* rely on any allegations of simple common law deceit in the total absence of Defendants' conscious intent to deceive, nor is the element of simple misrepresentation required to adequately plead those causes of action.

Furthermore, Plaintiff's cause of action for fraud and deceit, specifically alleges Defendants' misrepresentations, Defendants' knowledge of the falsity of those misrepresentations, Defendants' *intent to defraud and induce reliance*, Plaintiff's justifiable reliance upon Defendants' misrepresentations made with the *intent to deceive and to induce Plaintiff to rely* to their benefit, and Plaintiff's resultant damage (AOB 59-66). By any interpretation, such allegations go far beyond simple common law deceit, and

more than sufficiently allege Defendants' "conscious intent to deceive" Plaintiff, and thereby remove such conduct, under *Schonfeld, supra,* from immunity under Government Code, §822.2.

Therefore, because eleven of the thirteen causes of action in Plaintiff's Third Amended Complaint are not based on simple common law deceit; because Plaintiff's cause of action for fraud and deceit, and the other misrepresentations described in Plaintiff's factual allegations, clearly allege Defendants' conscious intent to deceive Plaintiff and to induce his reliance and unknowing participation in their wrongful acts; and because Plaintiff's Complaint clearly sets forth a cause of action for medical negligence due to the failure of Defendants to obtain Plaintiff's truly informed consent, Respondents' claim of "immunity" should be rejected. Even apart from this issue, it is clear that, as set forth in Plaintiff's Complaint, the actions or omissions of public employees Golde and Quan within the scope of their employment give rise to the various causes of action set forth in the Complaint against Golde and Quan individually, and therefore, under California Government Code, §815.2, The Regents as a public entity is liable for those injuries proximally [sic] caused by Golde's and Quan's conduct.

G. THE "PUBLIC POLICY" RATIONALES OFFERED BY RESPONDENTS DO NOT JUSTIFY AWARDING THE WRONGDOING ALLEGED WITH COMMERCIAL PROFIT.

Respondents argue that the profits gained through their deliberate appropriation and unconsented commercial exploitation of a patient's unique cells must be

protected, because to punish the breach of duties and violations of rights alleged would create a host of societal catastrophies. Perhaps the most disingenuous of these "public policy" arguments is Respondents' contention that reversing the dismissal of Plaintiff's Complaint will totally disrupt medical research.

Careful (and less self-serving) consideration of the facts alleged in this case supports no such conclusion. The extraordinary conduct of the Defendants in this case is certainly not typical of the vast majority of researchers. The facts make clear that the commercial research activities based upon Plaintiff's cells were not undertaken for purely academic or altruistic purposes, but were instead pursued and concealed for profit. The "advancement of medical science" and the "free pursuit of intellectual curiosity" could hardly have been best served by the Defendants' secret monopolization of Plaintiff's remarkable cells, the contractual provisions limiting access to the cells to commercial partners, the utilization of public university resources to advance private industry profit, and the patenting of the cell-line itself, let alone the failure to disclose and affirmative concealment of its properties from the patient source.

Defendants' fear that a "voluminous, time-consuming system "of record-keeping will need to be "created" by researchers and the biotechnology industry as a result of this case is equally unwarranted. The Respondents' argument admits that the vast majority of research situations using human specimens involve commonly shared biological materials from a large number of human sources. This case involves a single individual whose totally unique cells were the sole basis of a commercial

development. Identifying and tracing the specimens as originating from Plaintiff was a simple task that was, in fact, easily accomplished. Doing so was the only way the Respondents could hope to protect their own proprietary interests in the commercial products against challenges from competitors. Certainly, any biotechnology company interested in protecting its investments already has ample procedures for tracing whatever unique sources of materials have been employed.

Indeed, a far more genuine threat to medical care and the progress of research would be created should the conduct alleged in this case be legally condoned. Respondents' rationale would undermine the recognized right of patients to self-determination, and grant physician-researchers and their entrepreneurial partners unchecked authority to involve a patient in research and commercial development without the patient-subject's knowledge or consent. It would bestow upon physicians-researchers a legal *right* to unilaterally determine what is best for the patient and for society as determined by the physician's financial interests rather than the informed participation of the patient.

Respondents' inappropriate analogies of the facts of this case to garbage collection and land sales would have this court transform the special relationship between physician and patient into an arm's-length business transaction and replace the fiduciary trust and confidence inherent in the physician-patient relationship with a marketplace ethic of "let the patient beware". There are profound societal concerns and human values underlying the law's fundamental recognition of the physician's fiduciary obligation to the patient, and Respondents' desire to

profit from the violation of those obligations is hardly an adequate justification to dismantle those well-recognized values.

In light of the Respondents' efforts to characterize this case as one of "patient greed", it is important to keep in mind that it was the Respondents, and not the patient, who have chosen to monopolize and commercialize patient's cells and the breakthroughs they made possible. Respondents claim that Plaintiff somehow "abandoned" his unique cells, while contradicted by facts of the Complaint, would not constitute a defense to conversion, nor an "implied consent" to commercial exploitation without the patient's knowledge or participation.

Respondents' analogies to the legal prohibitions against the sale of body parts ignore the simple fact that while you may not be able to market or sell your body parts, that does not give someone else license to take them when they unilaterally decide that they have a profitable use for them. In the context of the trust inherent in the physician-patient relationship, one certainly does not expect that one's physician and his entrepreneurial commercial partner will be the party that deprives you of that fundamental interest, whether it be legally characterized as a property interest, or an interest protected from violation by the recognition of duty.

From a public policy perspective, Respondents' election to secretly transform the relationship into a commercial transaction highlights another danger to research that would flow from Respondents' position. This public policy concern was echoed in the testimony given during the

congressional hearings on the issues raised by this case (CTR 878-883).

The conduct of the Defendants in this case, and the arguments they now offer to justify that conduct, present a real danger of eroding public trust in the methods by which medical and biotechnological researchers obtain human materials, a danger that was warned of in the testimony of Dr. David Blake, Ph.D., Associate Dean for Research at Johns Hopkins University School of Medicine:

> "It would be unfortunate indeed if the exciting advances being made in the field of biotechnology as it relates to human health were to be dampened by a national sense that researchers and universities were profiting from the donations of research materials obtained deceptively from volunteers. While I believe that the current regulations governing informed consent should provide adequate protection, I also believe that the academic community needs to be totally open and honest about these matters. In the final analysis it is the public trust that matters most."

(CTR 883; Testimony of David A. Blake before the Subcommittee on Investigations and Oversight, Committee on Science and Technology, October 29, 1985, at p. 5.)

The danger to research that would be created by legal endorsement and financial reward of the Defendants' conduct in this case was also the subject of the congressional testimony of Dr. Thomas H. Murray, Ph.D., who was then an Associate Professor of Ethics and Public Policy at the Institute for the Medical Humanities at the University of Texas, and is currently the Director of the

Center for Bio-Medical Ethics at Case Western Reserve University School of Medicine:

> "I think the most appropriate model for thinking about our relation with parts of our body is the idea of gift . . . The problem arises when the conditions under which we thought we were making a gift suddenly and dramatically change. The thought of some medical scientist laboring over our now separated spleen or appendix, trying to uncover nature's secrets, or teaching a new generation of physicians how to care skillfully for the sick, does not bother us. It may even give us a little satisfaction, knowing that it was not entirely wasted. But the new possibility has arisen that someone – researcher, university, corporation – may become wealthy as a result of our gift – may win in the biotechnology lottery. And that thought makes many people disgruntled. When the terms of the gift are altered radically, then givers will see their relationship to the recipients in a different light . . .
>
> Biotechnology entrepreneurs should be strongly encouraged to adopt policies that assure that individuals and corporations do not unduly prosper from the gifts of individual's tissues and organs. . . . *In addition, the person should be justly compensated. Not because we "own" our bodies, but because there are two valuable things we want to preserve – the dignity of the human body and its parts, and the gift relationship between science and the public."*

(CTR:881-882; (Testimony of Thomas H. Murray, Ph.D., before the Subcommittee on Investigations and Oversight, U. S. House Committee on Science and Technology, October 29, 1985, pp. 8, 11, 13 and 19) (emphasis added).

The conclusion reached by Dr. Murray highlights the danger to research which would result from legal validation of the conduct alleged in this case: *"If biotechnologists fail to make provisions for a just sharing of profits with the person whose gifts made it possible, the public's sense of justice will be offended and no one will be the winner."* (Congressional testimony of Dr. Murray, quoted in U. S. Congress, Office of Technology Assessment, "New Developments in Biotechnology: Ownership of Human Tissue and Cells – Special Report", OTA-BA-337, [March, 1987] at p. 67) (emphasis added).

Indeed, if the dismissal of the Complaint herein is upheld, the only winners will be that small minority of physician-researchers and their business partners who wish to transcend for personal gain the well-recognized legal, ethical and public policy principles protecting patients from unconsented commercial research and exploitation. To reward violation of those principles with profit would be a grave disservice to research, the medical profession, patients, and the public trust.

III. CONCLUSION.

Based on the facts set forth in the Complaint, the arguments and authorities submitted in Appellant's Opening Brief, and this Reply Brief, the Superior Court's rulings sustaining the Demurrers of the Defendants and dismissing Plaintiff's Third Amended Complaint in this action and entry of judgment thereon should be reversed.

DATED: March 28, 1988

GAGE, MAZURSKY, SCHWARTZ
ANGELO & KUSSMAN

By: Jonathan T. Zackey
JONATHAN T. ZACKEY
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9454 Wilshire Boulevard, Suite 500, Beverly Hills, California 90212. I am employed in the office of a member of the bar of this court, at whose direction I made this service.

On March 28, 1988 I served the foregoing document described as PLAINTIFF'S REPLY BRIEF on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Richard M. Coleman, Esq.
1801 Avenue of the Stars
Suite 810
Los Angeles, CA 90067

Anthony Murray, Esq.
Ball, Hunt, Hart, Brown
& Baerwitz
4525 Wilshire Blvd., 3rd Fl.
Los Angeles, CA
90010-3886

John G. Fabiano, Esq.
Ian Crawford, Esq.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

James E. Holst, Esq.
Christine Helwick, Esq.
Allen B. Wagner, Esq.
Office of General Counsel
University of California
590 University Hall
Berkeley, CA 94720

Robert Dougherty, Esq.
Covington & Crowe
1131 West Sixth Street
Suite 300
Ontario, CA 91762

Clerk of the Superior Court
111 North Spring Street
Los Angeles, CA 90012

The Honorable
Warren H. Deering
Los Angeles County
Superior Court
111 North Hill St.
Department 88
Los Angeles, CA 90012

Peter Abrahams, Esq.
Horvitz, Levy & Amerian
15760 Ventura Blvd.
18th Floor
Encino, CA 91436

The Honorable
John L. Cole
3580 Wilshire Blvd.
Room 307
Los Angeles, CA 90010

and by placing these sealed envelopes, with postage fully prepaid thereon, in a mail box maintained by the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 28, 1988, at Beverly Hills, California.

/s/ Michele R. Tozer

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the

within action; my business address is 2808 W. Temple Street, Suite 102, Los Angeles, California 90026.

On March 28, 1988, I served the foregoing document described as PLAINTIFF'S REPLY BRIEF on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follow:

The Supreme Court of the State of California
Los Angeles District
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010
(7 copies)
(Hand delivered)

Court of Appeal
Second Appellate District
3580 Wilshire Blvd.
Room 301
Los Angeles, CA 90010
(Original plus 3 copies)
(Hand delivered)

I delivered this envelope by hand to the offices of the addressees.

Executed on March 28, 1988, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____

_____

Messenger Service (Print)

_____

S ___
Appellate No. B021195

IN THE SUPREME COURT OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC, and DOES 1 through 1000, inclusive,

Defendants and Respondents.

RESPONDENT GENETICS INSTITUTE, INC.'S PETITION FOR REVIEW

COLEMAN & MARCUS
RICHARD M. COLEMAN
1801 Avenue of the Stars
Suite 810
Los Angeles, CA 90067
(213) 277-2700

HALE AND DORR
JOHN G. FABIANO
IAN CRAWFORD
60 State Street
Boston, MA 02109
(617) 742-9100

Attorneys for Defendant and Respondent
GENETICS INSTITUTE, INC.

* * *

I. ISSUES PRESENTED

Petitioner Genetics Institute, Inc. (hereinafter "G.I.") petitions this Court for review following the opinion of the Court of Appeal, Second Appellate District, Division Four. The petition presents the following issues:

1. Is surgically removed, diseased human tissue tangible personal property?

2. Does a cause of action for conversion arise if diseased human tissue is surgically removed after the patient has executed a valid surgical consent form and is used later in biomedical research without the patient's express consent to conduct such research?

3. Does the execution of a valid surgical consent form result in the abandonment for all purposes of diseased human tissue surgically removed pursuant to that consent form and preclude a claim for conversion?

4. If surgically removed, diseased human tissue is capable of being converted, what is the measure of damages?

5. Should an entirely new cause of action with far-reaching public policy consequences be created by the Legislature rather than by the Court of Appeal?

* * *

Supreme Court No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN MOORE, Plaintiff and Appellant, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive, Defendants and Respondents.	Court of Appeal 2 Civil No. B021195 (Superior Court No. C 513 755)

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES
HONORABLE WARREN DEERING, JUDGE

PETITION FOR REVIEW

ANTHONY MURRAY
DONN DIMICHELE
BALL, HUNT, HART, BROWN
AND BAERWITZ
4525 Wilshire Blvd., Third Floor
Los Angeles, California
90010-3886
(213) 937-8999

Attorneys for Respondent
David W. Golde, M.D.

ISSUE PRESENTED FOR REVIEW

Where a medical researcher, in performing research on tissue removed from a patient with his consent and for therapeutic purposes, develops a product or procedure having potential commercial value, does the patient have a claim for conversion against the researcher on the ground that the patient did not expressly authorize the research?

* * *

S___

B021195

IN THE

SUPREME COURT OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

Appeal from the Superior Court for Los Angeles County
Warren Deering, Judge

PETITION FOR REVIEW OF RESPONDENT
SHIRLEY G. QUAN

HORVITZ, LEVY & AMERIAN
ELLIS J. HORVITZ
PETER ABRAHAMS
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800 and (213) 872-0802

Attorneys for Defendant and Respondent
SHIRLEY G. QUAN

* * *

ISSUES PRESENTED

1. May a university employee, a medical researcher, who was instructed by a physician to perform studies on tissues excised from the physician's patient in the court of therapeutic treatment, and who subsequently collaborated with the physician in creating and patenting a cell line which may prove beneficial to hundreds of thousands of other patients, be subject to liability for conversion because the physician allegedly failed to fully inform the patient of the uses to which he intended to put the excised tissue?

2. May a medical researcher employed by a university be held liable for conversion for allegedly conspiring with a patient's treating physician, also employed by the university, when the medical researcher was merely performing his or her assigned duties in the course and scope of his or her employment?

3. Is a public employee immune from liability by virtue of Government Code section 822.2, where the action is based on claims of misrepresentation and there is no allegation the employee acted with "actual fraud corruption, or actual malice?"

4. Whether respondent was deprived of her constitutional right to a written opinion where the Court of Appeal reversed a judgment in her favor without addressing any of the arguments asserted in her brief as to why the judgment should be affirmed.

* * *

IN THE

SUPREME COURT OF CALIFORNIA

JOHN MOORE, Plaintiff and Respondent, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICAL CORPORATION AND SANDOZ, INC. and DOES 1 through 1000, inclusive, Defendants and Appellants.	S006987 Court of Appeal No. B021195

PETITION FOR REVIEW

JAMES E. HOLST
JOHN F. LUNDBERG
GEORGE L. MARCHAND
ALLEN B. WAGNER
590 University Hall
University of California
Berkeley, California 94720
(415) 642-2822

Attorneys for Defendant,
Respondent, and Petitioner
THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA

* * *

QUESTIONS PRESENTED

1. Does the unqualified consent to surgery at a University teaching and research hospital permit scientific use of therapeutically removed tissues? That is, should there be a rebuttable presumption that such tissue may be used for scientific research or a presumed prohibition against such use?

2. Should the Court extend the definition of personal property and the law of conversion to make tortious a post-surgery research use of body tissues removed with patient consent?

3. When scientific use of therapeutically removed tissue results in commercial utility, is the University's transfer of research results to commercial entities a favored public policy activity *or* a tortious interference with private interests? That is, does person who is the source of human tissue used in medical research have an intangible right over potential commercial utility of the research results?

* * *

S ___
B021195

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a governmental entity; etc.; et al.,

Defendants and Respondents.

Consolidated Appeal from Separate Judgments of the Superior Court of Los Angeles County, Central District The Honorable Warren H. Deering and John L. Cole, Judges

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PETITION FOR REVIEW

COVINGTON & CROWE

By: ROBERT E. DOUGHERTY

1131 West Sixth Street
Suite 300
P.O. Box 1515
Ontario, CA 91762
(714) 983-9393

Attorneys for
Respondent and Petitioner
Sandoz Pharmaceuticals
Corporation

* * *

I

ISSUES PRESENTED

1. Is human tissue tangible personal property?

2. Does a cause of action for conversion arise if human tissue, which is removed pursuant to a consent to therapeutic surgery, is later used in biomedical research without first obtaining the patient's express consent to research?

3. Notwithstanding Health and Safety Code section 7054.4, must a medical practitioner return surgically removed diseased[2] human tissue to the patient, if the patient demands its return?

4. If using human tissue in biomedical research, without first obtaining the patient's express consent to research, is conversion, what is the measure of damages? Does the patient have a right to "share in the profits" in

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[2] At MO 8 n.4 the Court of Appeal states, "Although Defendants referred to Plaintiff's spleen as 'diseased,' there is nothing in the Complaint or record to support that characterization. In the Patent, which the Court of Appeal observed was part of the record (MO 11), the condition of Appellant Moore's spleen is described at page 7, lines 13-21, as follows: "In October 1976 the patient underwent splenectomy. The spleen weighed about 6 kg and histopathologic examination showed diffuse infiltration with tartrate-resistant acid-phosphatase-containing hairy cells. Transmission electron microscopy revealed the neoplastic cells to have ultrastructure typical of hairy cells, and several characteristic 'ribosome-lamellar complexes' were identified."

the event a profitable pharmaceutical product is later made from a cell line derived from the patient's tissues?

* * *

Supreme Court No. ___
Appellant No. B021195

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

JOHN MOORE,

Plaintiff and Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A GOVERNMENTAL ENTITY; DAVID W. GOLDE, M.D.; SHIRLEY G. QUAN; GENETICS INSTITUTE, INC.; SANDOZ, LTD.; SANDOZ UNITED STATES, INC.; SANDOZ PHARMACEUTICALS CORPORATION aka SANDOZ, INC. and DOES 1 through 1000, inclusive,

Defendants and Respondents.

ANSWER TO PETITIONS FOR REVIEW OF DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

LAW OFFICES OF GAGE,
MAZURSKY, SCHWARTZ,
ANGELO & KUSSMAN

By: SANFORD M. GAGE
CHRISTOPHER E. ANGELO
JONATHAN T. ZACKEY

9454 Wilshire Boulevard,
Fifth Floor
Beverly Hills, California 90212
(213) 273-0904

Attorneys for Plaintiff and
Appellant

* * *

I. ADDITIONAL ISSUES PRESENTED FOR REVIEW

Plaintiff and appellant, in the event the Petitions for Review filed herein are granted, requests review of the following issues, in addition to those stated in the Petitions for Review:

1. Was the Court of Appeal correct in ruling that the demurrers to the first cause of action for conversion, the only cause of action considered or decided by the trial court, were improperly sustained, the remanding to the trial court the remaining twelve separate cause of action, which have never been expressly ruled upon?

2. Was the Court of Appeal ruling directing the trial court to reexamine the complaint herein, including consideration of unresolved demurrers, motions to strike, and the potential for amendment with regard to the twelve remaining and separate causes of action set forth therein, proper?

3. Do medical patients have the right to refuse to participate in commercial research and exploitation for profit by their treating physicians?

4. Are medical patients presumed to give "consent" to medical research, commercial exploitation, and/or patenting of their unique cells and genetic material, even when those facts and activities have never been disclosed to the patient?

5. Does the consent of a medical patient to a recommended therapeutic procedure somehow constitute an unqualified "consent" to undisclosed human research, commercial research and exploitation, and/or patenting

of that patient's unique cells and genetic material by the treating physician and that physician's commercial partners, without the patient's knowledge or participation?

Should the Petitions for Review be granted, or the additional questions presented *supra* be answered in the negative, appellant further requests review of the following issues, which would remain unresolved in this case because they have not yet been expressly ruled upon or even considered by the trial court or the Court of Appeal:

6. Does a complaint which alleges that a treating physician obtained access to, patented and commercially exploited for profit a medical patient's unique and valuable cells and genetic material during an extended period of medical care, without informing the patient or obtaining the patient's consent to such activities, state a cause of action for failure to obtain informed consent?

7. Does a complaint which alleges that a treating physician obtained access to a patient's unique and valuable cells and genetic material, by virtue of and in the course of a physician-patient relationship, and patented and commercially exploited them for profit for himself and his commercial partners without disclosing these activities to the patient or permitting the patient to participate financially, state a cause of action for breach of fiduciary duty?

8. Are allegations that a treating physician and his commercial collaborators expropriated a medical patient's unique cells and genetic materials for use in their own commercial and patent activities for profit, without disclosing to the patient the unique characteristics or commercial value of his cells, while inducing him

to continue to provide them with samples of those materials in the context of medical care, sufficient to constitute a cause of action for fraud and deceit?

9. Does a complaint which alleges that a treating physician and his commercial partners obtained significant competitive advantage in the development of an extremely profitable biotechnology product utilizing a medical patient's unique cells and genetic material without that patient's knowledge or consent, state a cause of action for unjust enrichment?

10. Similarly, do the allegations set forth in Plaintiff's Third Amended Complaint sufficiently plead the remaining eight causes of action which also have yet to be considered or ruled upon, i.e., causes of action for quasi-contract, bad faith breach of the implied covenant, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief?

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